

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

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COMPLAINT OF THE CITY AND  
COUNTY OF SAN FRANCISCO

Docket No. C2011-2

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**MOTION OF UNITED STATES POSTAL SERVICE  
TO STAY PROCEEDINGS**  
(September 29, 2011)

The Postal Service respectfully requests that the Commission grant this motion to stay proceedings in this docket, which considers the Complaint brought by the City and County of San Francisco (the "Complaint").<sup>1</sup> The Complaint, pursuant to 39 U.S.C. § 3662, alleges that the Postal Service's single point mail delivery to single-room occupancy ("SRO") hotels violates 39 U.S.C. § 403(c) and other statutes and regulations, including 39 U.S.C. § 401(2). This case closely parallels a similar action brought by Complainant (as lead Plaintiff), *City and County of San Francisco, et al., v. United States Postal Service*, Civ. No. 3:09-cv-01964-RS (EDL), (N.D. Cal. 2009). On July 29, 2011, the Commission granted the Postal Service's motion to dismiss, in part, dismissing Count I to the extent it alleges that the reclassification of delivery to SRO hotels needed to be accomplished by rulemaking, as opposed to just interpretation of existing regulations.

As described below, principles of judicial comity and judicial economy (also called abstention) support staying further Commission proceedings to consider the Complaint at this time; instead, the Commission should allow the federal District Court to complete its consideration of the delivery mode provided

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<sup>1</sup> Complaint of the City and County of San Francisco, PRC Docket No. C2011-2 (May 18, 2011).

to SRO hotels. More than two years ago, Complainant (acting as lead Plaintiff in the federal court case) disclaimed interest in pursuing statutory and regulatory claims at the Commission. Complainant did so to avoid dismissal of its federal court complaint and also to avoid the usual legal necessity of first exhausting administrative remedies by asking the Postal Regulatory Commission to hear its complaint. The Court relied upon that disclaimer to allow Plaintiff to pursue only its Constitutional claims.<sup>2</sup> Nearly two years later, extensive discovery having been completed<sup>3</sup> to the Court's apparent satisfaction (which Complainant asserts can likely be relied upon before the Commission to the exclusion of additional discovery—Complaint ¶ 49)<sup>4</sup> and the deadline for filing of promised cross-motions for summary judgment has come and gone.<sup>5</sup> If that motion is not dispositive, a full trial is already scheduled for the coming months to decide the matter.

Plaintiff/Complainant has openly engaged in forum shopping by first filing in the federal District Court local to the *res* in these cases—SRO hotels in San Francisco—thereafter disclaiming interest in statutory and regulatory claims that would have taken this case to the Commission. Only later, as federal discovery

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<sup>2</sup> Attached as Exhibit 1 hereto is the Court's *Order Granting in Part and Denying In Part Defendants' Motion to Dismiss* (November 5, 2009). The paragraph concluding at the top of page 5 memorializes Plaintiffs' forbearance from statutory and regulatory claims.

<sup>3</sup> Discovery has included 47 depositions (some taking more than a day). Plaintiffs served a combined total of 74 interrogatories (many were impressively compound), 57 requests for admission, and 132 requests for production of documents. The Postal Service produced a total of 25,578 pages in addition to extensive data extractions from postal data systems (including such information as AMS data showing delivery details for each multi-unit residence in the cities of San Francisco and New York). Discovery production by Plaintiffs in that case was considerably more problematic.

<sup>4</sup> This convergence of possible needs for discovery illustrates how closely tied together to a single body of facts and law the two cases actually are.

<sup>5</sup> Despite repeated statements of intention to file its own motion for summary judgment, Plaintiffs ultimately failed to do so. Only the Defendant's motion is therefore pending. Attached hereto as Exhibit 2 is the memorandum supporting Defendant's motion for summary judgment.

swung in the direction of supporting only Defendant's motion for summary judgment, Plaintiff/Complainant changed its mind and now asks the Commission also to engage its own limited judicial resources without allowing the first-filed complaint to finish traveling the river on which Plaintiffs first chose both to board and embark.

### PROCEDURAL HISTORY

On May 5, 2009, Complainant filed a complaint with the United States District Court for the Northern District of California, challenging the Postal Service's practice of providing single point delivery to SRO hotels. In July 2009, the Postal Service filed a motion to dismiss, arguing that the District Court lacked jurisdiction over the complaint because plaintiffs alleged statutory claims based on violations of Postal Service regulations, for which Congress first required exhaustion before the Postal Regulatory Commission.<sup>6</sup> As part of its motion to dismiss, the Postal Service argued that, even if a constitutional claim could be stated, its resolution should be deferred pending the outcome of the required regulatory process before the Commission. *Id.* Plaintiffs' opposition to the Postal Service motion to dismiss, filed in August 2009, responded to the cogent arguments in support of Commission jurisdiction *ab initio* by disavowing any and all statutory and regulatory claims underlying Plaintiffs' case.

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<sup>6</sup> See *Federal Defendants' Notice of Motion and Motion to Dismiss Complaint* (July 27, 2009) attached hereto as Exhibit 3.

On November 5, 2009, the court dismissed Plaintiff's claims for declaratory judgment, all claims based upon regulatory or statutory grounds, and its claims against Postal Service employees in their individual capacities, leaving only the Complainant's constitutional claims based on the equal protection provision of the Fifth Amendment, the right of free speech and freedom of association under the First Amendment, and the right to privacy.<sup>7</sup> In its Order, the District Court acknowledged Plaintiffs' judicial admission that the Postal Service's conduct, as alleged by Plaintiffs did not violate 39 U.S.C. § 403(c), stating:

By its terms, Section 3662 applies only to violations of the statute or the regulations promulgated pursuant to the statute. Defendants seek to have the Court construe Plaintiffs' claim as statutory claims under Section 403(c). But Plaintiffs allege that Defendants' conduct violate provisions of the United States Constitution, **not Section 403(c)**.

*Id.* (Emphasis added).

Plaintiff, now acting as Complainant, challenges the same Postal Service operational policy and conduct in the Complaint filed with the Commission on May 18, 2011, effectively reviving grounds expressly disavowed in its opposition to the Postal Service motion to dismiss in District Court. In doing so, Plaintiff/Complainant is attempting to undertake piecemeal litigation in respective forums. Because Plaintiff/Complainant wanted to stay in the local federal District Court two years, it disavowed any statutory and regulatory claims as part of its case. This persuaded the District Court to retain jurisdiction. Now that the first filed case is ripe for disposition on Defendant United States Postal Service's

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<sup>7</sup> *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss* (November 5, 2009). This document was attached as Exhibit 1 to *Motion of United States Postal Service for Partial Dismissal of the Complaint*, (June 7, 2011) in this docket.

motion for summary judgment, the City and County of San Francisco want to start over by invoking the Commission's jurisdiction. The Postal Service urges the Commission to stop the blatant forum shopping—and waste of Postal Service and Department of Justice, to say nothing of Commission resources— by staying this case pending the resolution, whether on motion or by trial, that will soon result in the original forum of Plaintiff/Complainant's choice.

The District Court's Order (on the aforementioned Postal Service motion to dismiss proceedings) fails to address the many specific grounds identified by the Postal Service that bar Plaintiffs from any relief on regulatory or statutory grounds (and that, in the Postal Service's view, should also bar Plaintiffs' constitutional tort theories). These grounds include: (1) lack of standing, (2) failure to show any causal nexus between Postal Service actions and the claimed harms, (3) the lack of any valid cause of action, (4) that the relief sought cannot resolve Plaintiffs' problems (redressability), (5) that Plaintiffs' claims are barred by the Federal Tort Claims Act, (6) Plaintiffs' alternate avenues for relief (a tort claim that would be handled in conformity with the Federal Tort Claims Act, appeal to the Postal Service Consumer Advocate, or a complaint with the Postal Regulatory Commission), (7) criminal complaints pursuant to 18 U.S.C. §§ 1391-1437, (8) the lack of a justiciable controversy since any impact of the supremacy clause on the San Francisco statutory requirement that SRO hotels install apartment style delivery receptacles was not properly raised and (9) that *Currier v. Potter*, 379 F.3d 716 (9<sup>th</sup> Cir. 2003), required dismissal. So while Plaintiffs' statutory and regulatory claims were all dismissed by the federal District Court,

leaving only so-called constitutional claims, Complainant previously disavowed and dismissed regulatory claims that it now seeks to set before the Commission for decision—while noting that the same evidentiary record can serve the needs of both cases. So having nearly exhausted its procedural options in the federal court case, Plaintiff/Complainant now seeks to restart the clock in a second forum. Such conduct epitomizes forum shopping that wastes the limited judicial resources of the federal courts and two federal agencies (USPS and DOJ) *seriatim*.

Complainant/Plaintiff's efforts to exhaust resources and make use of procedural tactics to delay one forum approaching a conclusion on the underlying complaints do not stop there. Recently as the June 30, 2011 date for filing cross motions for summary judgment finally approached (the date was later postponed), Complainant/Plaintiff filed a motion on June 34, 2011 seeking to stay the District Court proceedings, citing to the existence of its complaint filed with the Commission; the District Court quickly denied that motion noting that Plaintiffs had previously denied any interest in pursuing statutory or regulatory claims and that "As a matter of fairness, it is difficult to ignore plaintiffs' complete reversal of position [regarding the existence of statutory/regulatory claims]."<sup>8</sup> . On September 8, 2011, the Postal Service did file its motion for summary judgment in the District Court action.

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<sup>8</sup> The District Court's Order denying Plaintiff's motion to stay (and adjusting procedural schedule) was attached to the Postal Service *Answer* in this docket (August 8, 2011).

## ARGUMENT

As described above, Complainants have taken an indirect, mercurial approach to this litigation that indicates clear intention to waste two kinds of federal judicial and administrative adjudicatory resources, playing one case off the other as it perceives opportunities for extracting temporary advantage. Initially, Complainants brought an action in federal District Court, then disavowed any role for the Commission in response to the Postal Service's assertion that the Commission was the more appropriate forum. Then, after over two years of litigation in the District Court and "scorched-earth" discovery, Complainants have made an "about face," now contending the Commission is the more appropriate forum to hear its complaints about the Postal Service's conduct (which conduct Complainant now maintains does present a regulatory violation), and that resolution by the Commission would render the District Court action unnecessary. Complainants' inconsistent and inefficient choices regarding litigation posture and forum selection have forced the Postal Service, Department of Justice, and the District Court to expend substantial resources. If Complainants' approach is allowed to continue, the Commission's resources will be consumed as well. But, the Commission has the means to prevent this wasteful, inefficient, and undesirable outcome. As described below, the Commission should recognize the progress made in the District Court litigation and, in the interests of judicial economy and comity, stay the Commission proceeding.

In the context of duplicative or parallel litigation, courts have recognized judicial economy as a basis for staying one of multiple proceedings, identifying a number of factors that make one forum preferable to others. These factors include the order in which jurisdiction was obtained, the progress made in respective forums, the desirability of avoiding duplicative litigation, the prevention of forum shopping, and the desirability of avoiding piecemeal litigation. *Am. Int'l Underwriters (Philippines), Inc. v. The Cont'l Ins. Co.*, 843 F.2d 1253, 1258 (9<sup>th</sup> Cir. 1988) (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16-21 (1983) and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976)). Indeed, as *Cone* modifies *Colorado River*, deference to the first forum is also appropriate if it has asserted jurisdiction over some *res*, which is precisely what the Northern District California has done in connection with the SRO hotels located in San Francisco.<sup>9</sup>

In *Continental Insurance*, a New York state court had presided over two-and-a-half years of litigation, decided seven motions, and overseen substantial discovery before the plaintiff filed a duplicative case in a California federal court. 843 F.2d at 1258. The plaintiff filed in the federal court in part because of its perception that the federal rules of evidence were more favorable than the rules in effect in the New York state court. *Id.* at 1259. Applying the factors listed above, the United States District Court for the Central District of California abstained, and the Ninth Circuit affirmed. *Id.* at 1261.

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<sup>9</sup> Justice Rehnquist further observes, “[W]ithin the notion of comity lies a universality that can be useful in the abstention context. ... [Judicial] comity has come to embrace not only deference between federal and state courts, but also deference within the federal system itself.” 46 Stan. L. Rev. 1049 at 10.

Which case was filed first and the progress made in each both support a Commission stay in this matter. On May 5, 2009, Complainant filed a complaint in the United States District Court for the Northern District of California. Over two years later, after substantial discovery and a federal court decision granting a part a motion to dismiss, and shortly before the filing of a potentially dispositive motion for summary judgment, Complainant brought its Complaint to the Postal Regulatory Commission. As in *Continental Insurance*, the federal court's status as the earlier forum with the more developed evidentiary record now ripe for decision makes it a more appropriate forum than the Commission, and supports stay of the Commission proceeding.

The desirability of avoiding duplicative and piecemeal litigation and the prevention of forum shopping also support a stay in this matter. The federal court granted in part a Postal Service motion to dismiss, limiting the federal court matter to the "constitutional" claims contained in the complaint. At the very least, Plaintiff/Complainant's trading off the cases against one another, variously arguing that one should or should not be stayed or relied upon in favor of the other, embodies forum shopping in its least efficient—or most consumptive—form. This strategy leads to piecemeal litigation, with the federal court considering the "constitutional" claims at the same time that the Commission considers statutory and regulatory claims that are so closely interwoven, they can depend upon a factual record developed through discovery in just one forum.<sup>10</sup> A

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<sup>10</sup> Complainant's claim that the Postal Service has refused to supply documentation of its "decision to ignore POM 631.45" (Complaint ¶ 50(a)) seeks documents of a negative that do not exist, since language earlier in that section directs one first to POM 615 for delivery to hotels. Subparagraph (b) attempts to resuscitate a claim already adjudicated and dismissed by the

comparison of the federal court complaint with the Commission Complaint reveals the close similarity and overlap of the claims and the underlying allegations, confirming the fact that the litigation before the Commission and the federal court are duplicative. In this matter, Complainant has engaged in blatant forum shopping, as in its guise as Plaintiff it refused to file a complaint with the Commission when that argument was convenient; now it has filed with the Commission and sought to stay proceedings in the federal court after receiving an unfavorable outcome in motions and discovery practice before the federal court. Accordingly, the factors identified in *Continental Insurance* provide strong support for a stay of the Commission proceeding.

At least one regulatory body identified “concerns of judicial administration to prevent redundant and unnecessary litigation” in support of its decision to alter regulatory proceedings in deference to more appropriate consideration by a federal court. See *Key v. United States Postal Service*, 31 M.S.P.R. 197 (1986) (abstaining in deference to District Court action). In *Key*, the Merit Systems Protection Board and the United States District Court for the District of New Jersey were dealing simultaneously with an issue regarding the Postal Service’s accommodation of plaintiff’s handicap condition. *Id.* at 199. The identical issue arose in both forums because plaintiff had brought separate and distinct causes of action in each forum – the administrative case concerned plaintiff’s removal and the District Court case concerned claims under the Rehabilitation Act. *Id.* As the two litigation matters progressed, the issues in the two forums became

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District Court; subparagraph (c) simply conflates (a) and (b) to assert confusion that does not exist. So the Complainant’s claims about potential need for additional discovery ultimately ring empty.

virtually identical. *Id.* On the basis of judicial economy, the MSPB abstained in deference to the District Court. *Id.* at 200. Although this case deals with abstention rather than a stay (sought by this motion), reasoning that supports abstention also supports a stay. See *Cone*, 460 U.S. at 28.

As in *Key*, here the Commission and the District Court are dealing with a virtually identical issue – legality of the Postal Service’s method of delivery to SRO hotels – which claims Complainant only **labels** differently before the Commission. Complainants now have pending a District Court action for “constitutional” claims and a Commission action for statutory and regulatory claims, but all claims turn on the legality of the Postal Service’s operational policy regarding delivery to SRO hotels (and hotels generally). Thus, the same “concerns of judicial administration to prevent redundant and unnecessary litigation” dictate that the Commission should defer to the District Court and stay the Commission proceeding. As shown in the history of reported decisions discussing judicial economy and comity, there is every likelihood that adjudication in the second forum will be simplified or even supplanted by application of venerable *res judicata* principles. See *Office of Civil Rights Commission v. Dayton Christian School, Inc.* 477 U.S. 619 (1986) (deference by the second forum appropriate when the first provides a full and fair opportunity to litigate).

Plaintiff/Complainant may well attempt to continue exploiting its shifting approach to this litigation by arguing that a clear separation of issues has emerged from the seemingly chaotic proceedings so far, and that judicial

economy would not be served by a stay, since the respective forums may be addressing different questions. But since both can apparently rely upon a factual record generated in only the first chosen forum, the distinction in legal issues is somewhat illusory. There is substantial overlap, perhaps even identity, between the logical and legal principles that must be addressed by both adjudicators even if constitutional questions are separated from consideration of the regulatory and statutory ones. A coherent approach to resolving Plaintiff/Complainant's claims is likely to gain substantial benefit from each forum addressing these claims *seriatim*, rather than proceeding in parallel. Moreover, the Commission's consideration of the statutory and regulatory issues, as they have been expressed by Complainant, will be enhanced immeasurably by the Court's legal conclusions based on identical facts. Considering the history of this litigation, and the progress and status that has already been achieved in the District Court, this is precisely the kind of situation where principles of comity and judicial economy should control.

CONCLUSION

The United States Postal Service respectfully requests that the Postal Regulatory Commission stay this complaint proceeding in deference to the consideration of this matter in the United States District Court for the Northern District of California.

Respectfully submitted,

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September 29, 2011

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,  
et al.,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE, et al.,

Defendants.

No. C 09-01964 JSW

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS**

Now before the Court is the motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) filed by defendants United States Postal Service ("USPS"), John Potter, Michael Daley, and Noemi Luna (collectively "Defendants"). Having considered the parties' pleadings and the relevant legal authority, the Court hereby grants in part and denies in part Defendants' motion to dismiss.

**BACKGROUND**

Plaintiffs contend that Defendants refusal to deliver mail to individual locked mailboxes of residents at Single Room Occupancy buildings ("SROs") violates the equal protection provision of the Fifth Amendment, the right of free speech and freedom of association under the First Amendment, and the right to privacy under the United States Constitution. The Court shall address additional facts as necessary to its analysis in the remainder of this Order.

## ANALYSIS

### A. Legal Standards Applicable to Motion to Dismiss.

A party moving to dismiss under Rule 12(b)(1) may make a facial or a factual attack on jurisdiction. A facial attack challenges the sufficiency of the jurisdictional allegations in a complaint. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual challenge instead “attack[s] the substance of a complaint’s jurisdictional allegations despite their formal sufficiency, and in so doing rel[ies] on affidavits or any other evidence properly before the court.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (citation omitted); accord *Safe Air*, 373 F.3d at 1039. In resolving a factual attack on jurisdiction, the court “need not assume the truthfulness of the plaintiff’s allegations.” *Id.* (citation omitted).

When “the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action,” a jurisdictional finding of genuinely disputed facts is inappropriate. *Id.* (internal quotations and citations omitted). “The question of jurisdiction and the merits of an action are intertwined where a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff’s substantive claim for relief.” *Id.* (internal quotation and citation omitted). Notwithstanding this general rule, dismissal for lack of subject matter jurisdiction, even when intertwined with the merits, may be appropriate “when the allegations of the complaint are frivolous.” *Thornhill Publ’g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 734 (9th Cir. 1979) (citation omitted).

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not required to accept legal conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim upon which relief may be granted. *McGlinchy v. Shell Chemical Co.*,

1 845 F.2d 802, 810 (9th Cir. 1988). Even under the liberal pleading standard of Federal Rule of  
 2 Civil Procedure 8(a)(2), a plaintiff must do more than recite the elements of the claim and must  
 3 “provide the grounds of his entitlement to relief.” *Bell Atlantic Corporation v. Twombly*, 550  
 4 U.S. 544, 555 (2007) (internal brackets and quotations omitted). The pleading must not merely  
 5 allege conduct that is conceivable. Rather, plaintiffs must allege “enough facts to state a claim  
 6 to relief that is plausible on its face.” *Id.* at 570.

7 **B. Defendants’ Motion to Dismiss.**

8 **1. Plaintiffs Sufficiently Allege Standing.**

9 Defendants challenge Plaintiffs’ standing to bring this action. “Article III of the  
 10 Constitution requires that a plaintiff have standing before a case may be adjudicated.”  
 11 *Covington v. Idaho*, 358 F.3d 626, 637 (9th Cir. 2004). To satisfy the Constitution’s standing  
 12 requirements, a plaintiff must show (1) an “injury in fact” that is (a) concrete and particularized  
 13 and (b) actual or imminent, not conjectural or hypothetical; (2) the injury must be fairly  
 14 traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to  
 15 merely speculative, that the injury will be redressed by a favorable decision. *Lujan v.*  
 16 *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Covington v. Jefferson County*,  
 17 358 F.3d 626, 637-38 (9th Cir. 2004). A plaintiff, as the party invoking federal jurisdiction,  
 18 bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561. “At the pleading stage,  
 19 general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a  
 20 motion dismiss, [courts] presume that general allegations embrace those specific facts that are  
 21 necessary to support the claim.” *Id.* (internal cite and quotations omitted).

22 Upon review of the complaint, the Court finds that Plaintiffs allege sufficient facts to  
 23 satisfy all three requirements of standing. The City alleges that it has been injured by  
 24 Defendants’ conduct, that the injuries alleged are traceable to Defendants’ conduct, and that  
 25 their injuries will be redressed by a favorable decision.

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1                   **2. The Postal Accountability and Enhancement Act Does Not Bar Plaintiffs'**  
 2                   **Constitutional claims.**

3                   Defendants argue that Congress created an exclusive statutory scheme for addressing  
 4 Plaintiffs' claims through the 2006 Postal Accountability and Enhancement Act ("PAEA") and  
 5 that the Court should dismiss Plaintiffs' first through fourth claims for failure to exhaust the  
 6 administrative remedies for claims under the PAEA. The PAEA amended Section 3662 of the  
 7 Postal Reorganization Act, 39 U.S.C. §§ 101, *et seq.*, to provide: "Any interested person ... who  
 8 believes the Postal Service is not operating in conformance with the requirements of the  
 9 provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations  
 10 promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory  
 11 Commission in such form and manner as the Commission may prescribe." *See* 42 U.S.C. §  
 12 3662. Section 403(c) provides: "In providing services and in establishing classifications, rates,  
 13 and fees under this title, the Postal Service shall not, except as specifically authorized in this  
 14 title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant  
 15 any undue or unreasonable preferences to any such user." *See* 39 U.S.C. § 403(c). Defendants  
 16 contend that Plaintiffs' claims fall under Section 403(c) because they allege that USPS  
 17 discriminates between users of the mails, and thus, Plaintiffs should be required to first exhaust  
 18 their remedies by lodging a complaint with the Postal Regulatory Commission in accordance  
 19 with Section 3662.

20                   By its terms, Section 3662 applies only to violations of the statute or the regulations  
 21 promulgated pursuant to the statute. Defendants seek to have the Court construe Plaintiffs'  
 22 claim as statutory claims under Section 403(c). But Plaintiffs allege that Defendants' conduct  
 23 violate provisions of the United States Constitution, not Section 403(c). Contrary to  
 24 Defendants' contention, Plaintiffs' constitutional claims do not "depend entirely on an express  
 25 statutory claim." (Mot. at 12.) Notably, the court in *Currier v. Potter*, 379 F.3d 716 (9th Cir.  
 26 2003), which is binding on this Court, analyzed the court's jurisdiction over the plaintiffs'  
 27 regulatory, statutory, and constitutional claims separately. Defendants argue that the PAEA  
 28 changed the legal landscape so dramatically as to render *Currier* inapplicable or overrule

1 *Currier*. The Court disagrees. Nevertheless, the Court need not determine, pursuant to *Currier*,  
2 whether claims under Section 403(c) may be adjudicated in federal court because Plaintiffs do  
3 not assert statutory claims here. Their claims are constitutional ones.

4 In support of their argument that Plaintiffs' claims fall under Section 403(c) of the  
5 PAEA, they cite to inapplicable out of circuit authority. See *LeMay v. Postal Service*, 450 F.3d  
6 797 (8th Cir. 2006); *The Enterprise, Inc. v. Bolger*, 774 F. 2d 159 (6th Cir. 1985).  
7 In *LeMay*, the court held that the plaintiff's claim that the USPS entered into and breached a  
8 federal common law contract to provide enhanced services with Priory Mail was a claim  
9 regarding postal rates and services under the Postal Reorganization Act. *Id.*, 450 F.3d at 800-  
10 801. The court did not address whether constitutional claims against the USPS would be barred  
11 by the Postal Reorganization Act.

12 In *Enterprise*, the court held that it lacked jurisdiction to review claims alleging that a  
13 provision of the Domestic Mail Manual violated the first and fifth amendments to the  
14 Constitution and the Postal Reorganization Act, 39 U.S.C. § 3623(c)(1), which requires the  
15 establishment of a fair and equitable mail classification system. The court concluded, based on  
16 the legislative history of the Postal Reorganization Act, that "review of a mail rate or  
17 classification decision may be sought only in a direct appeal to a United States Court of Appeals  
18 under 39 U.S.C. § 3628." *Id.*, 774 F.2d at 161. Because the court in *Enterprise* was construing  
19 a predecessor statute to the PAEA with different language, the Court does not find this case  
20 persuasive here.

21 The Court finds that Plaintiffs were not required under the PAEA to bring their  
22 constitutional claims before the Postal Regulatory Commission. Therefore, the Court will not  
23 dismiss Plaintiffs claims on this ground.

### 24 3. Plaintiffs' Claim for Declaratory Relief.

25 In order to establish subject matter jurisdiction over the declaratory relief claim,  
26 Plaintiffs bear the burden of establishing that an "actual controversy" existed at, and has  
27 continued since, the time they filed this action. See 28 U.S.C. § 2201; *Rhoades v. Avon*  
28 *Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007) ("When presented with a claim for a

1 declaratory judgment, ... federal courts must take care to ensure the presence of an actual case  
 2 or controversy, such that the judgment does not become an unconstitutional advisory opinion.”).  
 3 “The purpose of the Declaratory Judgment Act is to relieve potential defendants from the  
 4 Damoclean threat of impending litigation which a harassing adversary might brandish, while  
 5 initiating suit at his leisure-or never.” *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896  
 6 F.2d 1542, 1555 (9th Cir.1990) (internal quotes and citation omitted). The Court must  
 7 determine “whether the facts alleged, under all the circumstances, show that there is a  
 8 substantial controversy, between parties having adverse legal interests, of sufficient immediacy  
 9 and reality to warrant issuance of a declaratory judgment.” *Maryland Casualty Co. v. Pacific*  
 10 *Coal & Oil Co.*, 312 U.S. 270, 273 (1941). “If the defendant’s actions cause the plaintiff to  
 11 have a ‘real and reasonable apprehension that he will be subject to liability,’ the plaintiff has  
 12 presented a justiciable case or controversy.” *Spokane Indian Tribe v. United States*, 972 F.2d  
 13 1090, 1092 (9th Cir. 1992) (quoting *Hal Roach*, 896 F.2d at 1555).

14 In *Spokane Indian Tribe*, the government sent the plaintiff a letter stating that the  
 15 plaintiff was violating state and federal law and that state law provided for the immediate  
 16 seizure of the plaintiff’s gaming machines without court orders and destruction by order of the  
 17 court. The court held that “the reference to the violation of state and federal law and the power  
 18 to confiscate and destroy the gaming devices” gave the plaintiff a reasonable apprehension that  
 19 it would be subject to litigation and the loss of its property. *Id.* at 1092.

20 In contrast here, Plaintiffs rely on a letter sent by defendant San Francisco Postmaster  
 21 Noemi Luna (“Luna”) to the San Francisco Department of Building Inspection announcing that  
 22 the Postal Service would no longer deliver mail to individual mail receptacles in SROs.  
 23 (Compl., ¶ 29.) Luna asserted that delivering mail to individual SRO resident is contrary to  
 24 Postal Service regulations and that San Francisco’s Ordinance is preempted to the extent that it  
 25 attempts to frustrate or interfere with the operations of the Postal Service. (*Id.*) As Defendants  
 26 argue, Luna did not threaten any legal action, make any demands, or assert any power over the  
 27 City’s actions. The letter by Luna does not give rise to a “real and reasonable apprehension”  
 28

1 that the City "will be subject to liability." *Spokane*, 972 F.2d at 1092. Therefore, the Court  
 2 grants Defendants' motion as to Plaintiffs' claim for declaratory relief.

3 **4. Plaintiffs' Claims Against the Individual Defendants.**

4 Defendants argue that the claims against John Potter, Michael Daley, and Noemi Luna  
 5 (collectively, the "Individual Defendants") in their official capacity are superfluous to  
 6 Plaintiffs' claims against USPS and thus, should be dismissed. Plaintiffs counter that the claims  
 7 against the Individual Defendants would not be superfluous of Defendants' challenge to  
 8 Plaintiffs' claims on the grounds of sovereign immunity. However, in their reply brief,  
 9 Defendants clarify that 39 U.S.C. § 409 waives USPS's sovereign immunity and that USPS is  
 10 not raising sovereign immunity as a defense. In light of the waiver by Section 409 and USPS's  
 11 representations, the Court finds that the claims against the Individual Defendants are  
 12 superfluous. Therefore, the Court grants Defendants' motion to dismiss Plaintiffs' claims  
 13 against the Individual Defendants in their official capacities.

14 **CONCLUSION**

15 For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART  
 16 Defendants' motion to dismiss. The Court GRANTS Defendants' motion as to Plaintiffs'  
 17 declaratory relief claim and claims against the Individual Defendants and DENIES Defendants'  
 18 motion as to Plaintiffs' constitutional claims against USPS.

19 **IT IS SO ORDERED.**

20  
 21 Dated: November 5, 2009

  
 22 JEFFREY S. WHITE  
 23 UNITED STATES DISTRICT JUDGE  
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 25  
 26  
 27  
 28

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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO, *et al.*  
 Plaintiffs,  
 v.  
 UNITED STATES POSTAL SERVICE,  
 Defendant.

Case No. CV-09-1964 RS (EDL)

**NOTICE OF MOTION AND MOTION  
 FOR SUMMARY JUDGMENT FILED  
 BY UNITED STATES POSTAL  
 SERVICE**

Date: October 13, 2011  
 Time: 1:30 p.m.  
 Court: Courtroom 3, 17th Floor  
 Judge: Hon. Richard Seeborg

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on October 13, 2011 at 1:30 p.m. in Courtroom 3, 17th Floor, before the Honorable Richard Seeborg, 450 Golden Gate Avenue, San Francisco, CA 94102, or as soon as the matter may be heard, the United States Postal Service ("USPS") will and hereby does move this Court for an order granting summary judgment on plaintiffs' complaint. This notice and the motion are based on the memorandum of points and authorities, the declarations of Jonathan Lee, Noemi Luna, Dean Granholm, Michael Bradley, Steve Landi, James Rickher, Belinda Olson, Claude Wang, Jennifer Angelo, and Raizza Ty, each with the supporting exhibits, a Request for Judicial Notice with exhibits, all filed concurrently herewith, and on such other evidence as the Court may receive in connection with the motion.

**RELIEF REQUESTED**

The Postal Service requests plaintiffs' complaint be dismissed with prejudice.

**ISSUES PRESENTED**

1. Whether the Court lacks subject matter jurisdiction to grant the relief requested by plaintiffs because the Postal Reorganization Act precludes judicial scrutiny of Postal regulations.
2. Whether plaintiffs lack standing.
3. Whether plaintiffs can meet their burden of proving that the First Amendment requires USPS to provide centralized delivery to SRO Hotels.
4. Whether plaintiffs can meet their burden of proving that the Fifth Amendment's Equal Protection Clause requires centralized mail delivery to SRO Hotels.
5. Whether plaintiffs can meet their burden of proving that a constitutional right of association or right of privacy requires centralized mail delivery to SRO Hotels.

**I. INTRODUCTION**

This case is about whether the U.S. Constitution prescribes a particular method of delivery of the mail to select hotels plaintiffs have designated as Single Room Occupancy ("SRO") Hotels in San Francisco. Plaintiffs seek an order compelling USPS to convert the mode it delivers mail to approximately 300 SRO Hotels from "single-point" delivery -- delivery of all mail to the occupants in bulk to the hotel like it delivers to other hotels in San Francisco and

1 across the country -- to "centralized" delivery, which would require USPS to sort and deliver  
2 mail to approximately 14,000 individual boxes associated with each hotel room. Such a  
3 conversion would cost USPS more than \$2 million annually in San Francisco alone.

4 As a threshold matter, the Court lacks jurisdiction to the extent plaintiffs contend USPS  
5 violates its delivery regulations by refusing to convert the mode of delivery at SRO Hotels.  
6 *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004) (finding, in homeless challenge to general  
7 delivery, "there is no waiver of immunity, no substantive legal basis and no jurisdiction over  
8 claims asserted under [USPS] regulations"). Plaintiffs cannot establish a constitutional violation  
9 based on their interpretation of USPS regulations.

10 Second, plaintiffs lack constitutional standing because they cannot establish any harm  
11 stemming from the mode of mail delivery used at SRO Hotels and they cannot carry their burden  
12 to show any such harm is redressable through a change in the mode of delivery. After several  
13 motions to compel, none of the plaintiffs has produced any competent evidence of any harm to  
14 any plaintiff caused by single-point mail delivery at SRO Hotels and their theory of harm is  
15 woefully speculative. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Instead, the  
16 available evidence tends to negate, rather than support, plaintiffs' claim that mail delivery to  
17 individual locking boxes is more secure and private than single-point delivery. For example, the  
18 incidence of mail theft complaints is *greater* at SRO Hotels receiving centralized delivery to  
19 individual locked boxes than at SRO Hotels receiving single-point delivery in bulk to the hotel.

20 Third, USPS's decision not to convert delivery modes at SRO Hotels is constitutionally  
21 permissible under the First Amendment because it is based on USPS's dire need to reduce costs  
22 and increase efficiency in its operations. The mode of centralized delivery to 300 hotels is a non-  
23 public forum and access to a non-public forum may be restricted, so long as the restriction is  
24 reasonable and not viewpoint-based. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473  
25 U.S. 788, 808 (1985) (The restriction "need not be the most reasonable or the only reasonable  
26 limitation.") Here, USPS's decision easily meets this standard because of USPS's undisputed  
27 need to reduce costs and increase efficiency in its operations.

28 Fourth, in order to succeed, the Equal Protection claim requires either intentional

1 discrimination against plaintiffs based on their membership in a protected class such as race,  
 2 national origin, etc., *e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), or a showing  
 3 that similarly situated individuals were intentionally treated differently without a rational  
 4 relationship to a legitimate state purpose, *e.g.*, *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1  
 5 (1972). Far from involving a suspect classification, this case concerns USPS's decision not to  
 6 convert delivery modes at a group of hotels, because (1) they are hotels and (2) converting  
 7 delivery would be inefficient and costly. Because USPS's decision is rationally related to the  
 8 legitimate interests of increasing efficiency and reducing cost, the Equal Protection claim fails.

9 Fifth, neither the right of association nor the right of privacy for SRO Hotel occupants is  
 10 unreasonably burdened by any conduct of USPS. As an initial matter, conduct of third parties --  
 11 whether it be SRO Hotel owners, employees or occupants, or the City itself -- impinging on  
 12 association or privacy does not create a constitutional duty requiring USPS to change the mode  
 13 of delivery at any location. In any case, because mailbox keys are held by building management  
 14 or their employees when there is centralized delivery, there can be no showing by plaintiffs that  
 15 the alleged privacy and association violations by SRO Hotel employees would cease.

16 In sum, the SROs Hotels in San Francisco are hotels. The City defines, regulates,  
 17 licenses and taxes them as hotels. The properties advertise themselves as hotels. The buildings  
 18 have the physical characteristics of hotels. The occupancies are transient in nature and require no  
 19 long term commitment by the occupants. As hotels, these buildings have had long-established  
 20 modes of mail delivery. Based on a factually and legally unsupported interpretation of Postal  
 21 regulations, plaintiffs seek to impose their will on a beleaguered USPS and impose a costly  
 22 operational change by judicial order. For years, USPS has been experiencing severe financial  
 23 problems including annual multi-billion dollar operating losses. It has negotiated unprecedented  
 24 agreements with its labor unions to reduce personnel expenses, resulting in the elimination of  
 25 thousands of jobs, delivery routes, and retail installations. In its San Francisco District alone,  
 26 USPS has eliminated approximately 287 delivery routes, and more cuts are planned. Plaintiffs  
 27 would undo these cost-saving measures by forcing additional deliveries, infrastructure and costs  
 28 on USPS, as it faces default.

### A. Overview of USPS, Its Delivery Operations, and Its Financial Crisis.

Scope of service: USPS delivers the mail six days per week to approximately 150 million points of delivery in the 50 states and territories. Landi Dec. ¶4. Of these, approximately 88 million deliveries are in urban areas and are known as "City delivery." *Id.* SRO Hotels in San Francisco are included in the "City delivery" total, and all receive mail delivery service six days

1 per week. *Id.* ¶33.

2 Single-point mode of delivery: Single-point delivery is the most efficient mode of  
3 delivery available to USPS.<sup>1</sup> Landi Dec. ¶20. Using single-point, USPS does not have to sort or  
4 case mail in the office or at the point of delivery, but can instead make a delivery in bulk, and it  
5 does not incur the personnel and other infrastructure costs required by centralized delivery,  
6 including the costs of sorting, delivering and forwarding mail. Luna Dec. ¶18-21.

7 In San Francisco and throughout the country, USPS provides single-point mail delivery to  
8 such populations as (1) students living in dormitories, (2) seniors in assisted living centers, and  
9 (3) occupants including any long term occupants in hotels such as the Mark Hopkins, Fairmont,  
10 Ritz Carlton, and many others. Lee Dec. Ex. GGG (Supp. Rog. Rsp. 7); Wang Dec. ¶7;  
11 Granholm Dec. ¶10-11; Ex. R (Plaintiffs' expert Jacobson 96:24-97:6). USPS also uses single-  
12 point delivery at military bases and installations, marinas, trailer parks, government buildings,  
13 colleges, prisons and institutions. Lee Dec. Ex. Y-01 (POM §615.2); Wang Dec. ¶8-9; Granholm  
14 Dec. ¶11. Nationwide, USPS delivers to approximately 1 million delivery points using single-  
15 point. Bradley Dec. ¶5.

16 Financial pressures: For the past several years, USPS has been experiencing large  
17 decreases in mail volume, rising personnel expenses, and as a result, very large operating losses,  
18 which are well-publicized.<sup>2</sup> Lee Dec. Ex. W-54 (10-Q Disclosure). The most recent fiscal year  
19 resulted in a loss of \$8.505 billion. Granholm Dec. ¶7-9. The inflation-adjusted total of the last  
20 five years' losses is nearly \$25 billion. Bradley Dec. ¶33, Ex. A. The future outlook is no better -  
21 - USPS faces default later this month and insolvency within months. Lee Dec. Ex. ZZZZ.

22 These losses have persisted despite dramatic cost cutting efforts, including the number of  
23

---

24  
25 <sup>1</sup>Postal Operations Manual ("POM") §615.2 provides for single-point delivery: "Mail  
26 addressed to persons at hotels, schools, and similar places is delivered to the hotel or school..." Lee  
27 Dec. Ex. Y-01. Plaintiffs claim that under POM §631.451, SRO Hotels qualify as apartments and  
28 must be converted to centralized delivery because they have three or more units and a common  
address. *Id.* Under POM §631.6, conversions of a mode of delivery "refers to changing an existing  
mail delivery to a more economical and efficient mode..." *Id.*

<sup>2</sup>USPS's news releases are on-line at <http://about.usps.com/news/welcome.htm>

1 delivery routes, either by consolidating or eliminating routes, in a series of negotiated  
 2 memoranda with Postal employee unions. Landi Decl. ¶¶8-14; Luna Dec. ¶¶10-23; Lee Dec. Ex. A  
 3 (Beltran 33:17-37:3). In San Francisco District alone, USPS eliminated 287 routes, with more  
 4 cuts planned. Olson Dec. ¶¶12-13. An entire commercial service called VIMS used in office  
 5 buildings throughout San Francisco has been eliminated. Luna Dec. ¶¶24. USPS has announced  
 6 future plans to eliminate thousands of post offices and retail installations, reduce its personnel  
 7 expenses by eliminating thousands of positions, and implement a wide range of other cost cutting  
 8 measures. Lee Dec. Ex. N (Granholm 61:20-70:4); Ex. ZZZZ.

9       Converting the mode of delivery at all SROs in San Francisco would cost USPS in excess  
 10 of \$2 million *annually*, according to a USPS's economics expert Professor Bradley. Bradley Dec.  
 11 ¶¶4, 28-32, Ex. A. Professor Bradley calculated that the 14,000+ deliveries will require an  
 12 additional 18.7 delivery routes in San Francisco alone. *Id.* ¶¶30-31. If all single-point deliveries  
 13 nationwide were converted, because plaintiffs prevail on their constitutional claims, the annual  
 14 costs to USPS would be approximately \$300 million. *Id.* ¶¶5; Granholm Dec. ¶¶10.

#### 15 **B. Overview of SRO Hotels and Mail Delivery to SRO Hotels.**

16       It is undisputed that SRO Hotels are hotels. Lee Dec. Ex. KK (Shaw 155:17-156:22), Ex.  
 17 LLL (SROs "legally classified" as hotels), Ex. MMM ("SROs are officially characterized under  
 18 City law as hotels. Period."); Ty Dec. ¶¶34 (84% of SRO Hotels receiving single-point have had  
 19 transient occupancy codes in the City's Department of Building Inspection's ("DBI") records).  
 20 The SROs advertise as hotels. Lee Dec. Ex. VVV-MMMM.<sup>3</sup>

21       SROs Hotels have been long established in San Francisco as hotels. Lee Dec. Ex. T  
 22 (CCSF 5604). The average year of construction for SRO Hotels in San Francisco is 1911. *Id.*  
 23 CCSF 5635. No SRO Hotels have been constructed since World War II and the approximately  
 24 300 SRO Hotels receiving single-point delivery have received single-point service for decades.  
 25 *Id.* CCSF 5636 Fig. 16; Granholm ¶¶14. SRO Hotels have long been used for transient purposes.

---

26  
 27       <sup>3</sup>Plaintiffs' list of SRO Hotels includes El Drisco Hotel, 2901 Pacific, a high end tourist hotel  
 28 operated by Joi De Vivre Hospitality offering "food and wine" and spa packages (Lee Dec. Ex.  
 VVV) and Nob Hill Place, 1155 Jones, with monthly rentals of between \$2,000-\$5,000 for its  
 business clientele (Lee Dec. Ex. WWW).

1 Ex. T CCSF 5608 (S.F. SRO population "constantly shifting"), 5617 (research shows SRO  
2 occupants "more transient" than apartment dwellers).

3 In 2004, USPS began to receive requests from a few SRO Hotels to change the mode of  
4 delivery from single-point to centralized delivery. Under political pressure and a mistaken  
5 impression that only a small number of hotels sought conversion, USPS employees converted the  
6 mode of delivery at a small number of SRO Hotels in 2004.<sup>4</sup> Landi Dec. ¶6; Lee Dec. Ex. GG  
7 (Reed 109:19-111:5).

8 In 2006, San Francisco enacted an ordinance ("§41E") requiring all SRO owners to install  
9 individual-unit locked mail receptacles no later than July 30, 2007. Landi Dec. ¶7. The City did  
10 not notify USPS about §41E, until just before its passage. Angelo Dec. ¶1-7. When USPS  
11 became aware of §41E, a meeting was arranged with housing groups, U.S. Rep. Pelosi's staff and  
12 USPS. At the meeting, San Francisco Postmaster Noemi Luna explained that USPS policy for  
13 delivery at SROs was single-point delivery and that the installation of mail receptacles would not  
14 assure expanded delivery. *Id.* After the meeting, the City Attorney's Office represented that it  
15 agreed it could not compel USPS to deliver mail to individual mail receptacles at SROs, due to  
16 the Supremacy Clause. *Id.* ¶6.

17 In late 2008, USPS Pacific Area and Headquarters delivery managers became aware that  
18 local postal employees had been converting some SRO Hotels to expanded delivery in violation  
19 of postal regulations. Landi Dec. ¶15-19; Luna Dec. ¶14-22; Sanghera Dec. ¶3-8. After  
20 consulting Postal employees from the Pacific Area and Headquarters, Postmaster Luna sent a  
21 letter dated December 18, 2008, to the City explaining that USPS would not convert additional  
22 hotels to expanded delivery and that prior conversions had been erroneous. *Id.* Ex. A. USPS  
23 informed the City that it could not convert established modes of delivery at SRO Hotels in San  
24 Francisco because (1) under postal regulations the properties were hotels properly receiving

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25  
26 <sup>4</sup>Plaintiffs' press statements and the complaint alleged that no SRO Hotels received mail  
27 delivery to individual mailboxes. *E.g.* Lee Dec. Ex. E-10. But in discovery, Plaintiffs identified  
28 approximately 499 SRO Hotels and the mode of delivery for 463 of SRO Hotels. According to  
plaintiffs, 167 out of 463 (36.1%) hotels receive "centralized" delivery and 296 SRO Hotels receive  
"single-point" delivery. Lee Dec. Ex. UU. USPS records indicate that 324 of the 499 SROs receive  
single-point delivery and 172 receive centralized delivery. Rickher Dec. ¶18.

single-point delivery and (2) the conversion of mode of delivery to centralized delivery at SROs would be inefficient and costly to USPS. *Id.* Nevertheless, USPS honored all conversions which had received centralized delivery for 90 days or more. *Id.* Within a few days, San Francisco discontinued efforts to enforce §41E.<sup>5</sup> Lee Dec. Ex. E-33 (12/29/08 email).

**C. Undisputed Facts Describing the Reasonableness of USPS Providing Hotel Style Delivery, Rather than Apartment Style Delivery, to SRO Hotels.**

**1. Adding 14,000+ Deliveries Will Cost USPS Millions Annually.**

To convert the mode of delivery at approximately 320 SRO Hotels already being served with single drop delivery into 14,000 individual deliveries will cost USPS approximately \$2.3 million *annually*. Bradley Dec. ¶3-4, 28-32, Ex. A.<sup>6</sup>

**2. Plaintiffs Classify, Tax and Treat SRO Hotels as Hotels, Not Apartments.**

The City treats SRO Hotels as hotels, not as apartments. Lee Dec. Ex. KK (Shaw 155:21-22 “...there's no city law that classifies SROs as apartments. SRO rooms are not apartments.”); Ex. RRR - TTT, NNNN-OOOO, UUUU-VVVV (Executive Summary Reports). For example, the City’s municipal codes define SRO Hotels as “hotels” not “apartments.” RJN 3-6.

By local ordinance, the City requires annual reports from each of SRO Hotel. Lee Dec. Ex. RRR-TTT; RJN 5. The City's instructions to SRO Hotels specify that hotels are not to count apartments in their annual report regarding the occupancy of hotel rooms. The words “DO NOT INCLUDE APARTMENTS” appear multiple times in these instructions. *Id.* Ex. RRR. Each version of the Annual Unit Usage Report used by the City since 1982 has repeated this instruction. The City's instructions confirm that apartments are "dwelling unit[s] by definition

---

<sup>5</sup>Shortly thereafter, on April 16, 2009, the City presented a written demand letter, contending that SRO Hotels are entitled to the same method of mail delivery given to all other tenants in apartment buildings. Lee Dec. Ex. RR. The City's letter argued that USPS impermissibly singled out SRO Hotels for discriminatory treatment by refusing to deliver to individual locking mailboxes and demanded USPS's immediate agreement to deliver mail to all SRO Hotels with individual locking mailboxes. *Id.* The U.S. Attorney's Office responded on April 27, 2009. *Id.* Ex. SS.

<sup>6</sup>Plaintiffs will likely quibble with this calculations, but the City Attorney and plaintiffs' economist agree that the additional expense will be substantial. The City Attorney recently told the *New York Times* the annual cost was \$429,000. Lee Dec. Ex. B-432. Plaintiffs' expert calculated USPS's annual net costs in a range of \$1.0-1.6 million. Lee Dec. Ex. B (Berkman 99:6-103:9)

1 and must have cooking facilities and a private bathroom." *Id.* Ex. SSS ("Most Common  
 2 Questions Asked When Filing The Annual Unit Usage Report" #5) The complaint admits that  
 3 SRO Hotel rooms lack features required to meet the City's definition of apartments. Comp. ¶1.

4 The City charges SRO Hotels a hotel license fee. Ty Dec. ¶29; RJN 7; Lee Dec. Ex. G-  
 5 558, G-561, G-565. According to information provided in discovery, the City receives hotel  
 6 license fees from 71-73% of those SRO Hotels receiving single-point delivery. Ty Dec. ¶29.

7 The City imposes hotel taxes on SRO Hotels. Ty Dec. ¶30; RJN 8-12; Lee Dec. Ex. AA -  
 8 606, 608, Ex. NNNN, Ex. OOOO. According to information provided in discovery, the City has  
 9 assessed tourism and/or transient taxes on 358 SRO Hotels, including *89 % of those SRO Hotels*  
 10 *receiving single-point delivery*. Ty Dec. ¶30. The City received millions of dollars in Transient  
 11 Occupancy Tax and Tourism Improvement District tax revenues from SRO Hotels in 2010-2011.  
 12 Lee Dec. Ex. AA-619.

13 Tenderloin Housing Clinic, counsel of record for the non-City plaintiffs, is a property  
 14 owner and manager of SRO Hotels, and on its website, THC distinguishes between its 15 SRO  
 15 Hotels and 1 apartment complex, the Galvin Apartments. Lee Dec. Ex. KK-469 at 5.

### 16 **3. SRO Hotels' Physical Characteristics Resemble Hotels, Not Apartments.**

17 According to the complaint and the City's Planning Department, SRO Hotels are small,  
 18 with a maximum size of approximately 350 square feet. Lee Dec. Ex. T-CCSF5612. Typically,  
 19 SROs have no kitchen. *Id.* Most lack private bathrooms. *Id.* An apartment, by contrast, is  
 20 classified by the City as a dwelling unit that "must have cooking facilities and a private  
 21 bathroom." Lee Dec. Ex. SSS.

### 22 **4. Occupancy Expectations Are Inconsistent with Apartment Tenancy.**

23 The City imposes a Uniform Hotel Visitor Policy on SRO Hotels. RJN 15-16. The policy  
 24 restricts SRO occupants to a maximum of two visitors during daytime and overnight guests to a  
 25 monthly maximum of 8 nights. *Id.*; Lee Dec. Ex. KK (Shaw 235:2-25, 236:20-238:16). The City  
 26 created a Board of Supervisors SRO Task Force to improve the living conditions at SROs. Lee  
 27 Dec. Ex. V (Kronenberg 78:1-80:14), V-103, Ex. NN (Walton 140-147), NN-63. There is no  
 28 known City visitor policy regulating visitors to apartments or City apartment task force.

1 SRO occupants are not required to pay a security deposit or sign a lease. Lee Dec. Ex. FF  
 2 (Patel 27:1-30:18); Ex. M (Gaeta 55:2-14); Ex. R (Jacobson 177:19-178:5). SRO "leases" are in  
 3 many cases "day to day." *Id.* Ex. M (Gaeta 55:15-56:2). Apartment tenants typically pay a  
 4 security deposit and enter into long term leases. Lee Dec. Ex. R (Jacobson 262:8-263:2).

5 SRO occupants move from room to room within SRO Hotels or move from hotel to hotel.  
 6 Lee Dec. Ex. TTT (Henry Hotel Annual Unit Usage Reports). At the Henry Hotel, for example,  
 7 38 out of 132 units fluctuated from 2009 to 2010 from either "tourist" to "permanent" or vice  
 8 versa. *Id.*<sup>7</sup> The reports show quarterly, semi-annual and annual changes in the designations of  
 9 rooms as well as the use of rooms. *Id.*

10 City departments use SRO rooms as "stabilization rooms" for persons leaving treatment  
 11 programs or incarceration. Lee Dec. ZZ (Rsps. to RFAs 118-119); MM (Trotz 48:11-49:13,  
 12 126:18-130:20), MM-139-141. Only homeless persons are eligible for rooms in SRO Hotels  
 13 participating in the City's "master lease program." Lee Dec. Ex. NN (Walton 39:14-21), Ex. T-72  
 14 CCSF 5619-20. The City's ordinances allow seasonal fluctuations in the numbers of hotel rooms  
 15 rentable to tourists with more rooms being available for tourists in the summer season. Lee Dec.  
 16 Ex. F (Bosque 344:17-346:11, 348:19-350:25), Ex. FF (Patel 59:1-61:25, 65:11-66:5).

#### 17 **5. Plaintiffs and SRO Occupants Have Alternative Means of Communication.**

18 All SRO Hotel occupants in San Francisco receive mail delivery six days per week. Landi  
 19 Dec. ¶33. In addition, SRO Hotel occupants have in-room telephone and internet access. Lee  
 20 Dec. Ex. VVV-EEEE, Ex. FF (Patel 66:6-68:25). SRO Hotels participating in the City's master  
 21 lease program offer on-site City services, such as counseling and health care. Lee Ex. MM (Trotz  
 22 53:7-16, 117:6-25). They also offer computers with internet access in their common areas and  
 23 internet and telephone hookups in the SRO rooms. *Id.* 52:2-19, 53:17-55:8, 55:9-56:13, 60:20-  
 24 61:25. 230 out of 650 mail delivery complaints received by the Postal Inspection Service at SROs  
 25 Hotels are from Netflix, which is an on-line provider of entertainment, demonstrating the

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26  
 27 <sup>7</sup>For example, rooms 407, 408, 409, 410, 412, 417, 421, 423, 503, 507, 512, 516, 518, 519,  
 28 603, 606, 607, 608, 609, 612, 619, and 717 changed from "tourist" to "residential" and 302, 304, 308,  
 309, 508, 509, 510, 520, 522, 601, 602, 604, 610, 611, 614, 620, 701, 707, and 709 changed from  
 "residential" to "tourist" that year.

prevalence of internet usage among SRO hotel occupants. Rickher Dec. ¶15.

#### **6. Single Point Delivery to SRO Hotels Is Secure.**

Unfortunately, mail security is a source of risk and concern across the entire delivery operations network, as USPS delivers mail to millions of locked and unlocked containers six days per week, for more than 300 days per year on a nationwide basis. Granholm Dec. ¶28-31; Olson Dec. ¶21; Landi Dec. ¶33.

According to the complaint, SRO Hotels account for 4% of the City's population, yet they account for barely more than 1% of lost or stolen mail claims. Rickher Dec. ¶10. In fact, the majority of lost and stolen mail complaints associated with SRO Hotels come from those receiving centralized delivery, even though SRO Hotels receiving single point delivery far outnumber them. *Id.* ¶15 (55% of all complaints from SROs are from centralized delivery SROs).

In addition, the City provides a service called "311" for communicating residents' concerns to the City by telephone and on-line. According to its discovery response, from January 2010-May 2011, the City received 4,005 complaints from SRO Hotels to its 311 service, only four of which (less than 0.1%) involved mail delivery problems. Lee Dec. Ex. QQQ.

Centralized delivery does not guarantee mail security. In fact, the majority of mail theft in San Francisco occurs from centralized, locked mailboxes plaintiffs seek. Rickher Dec. ¶5-6; Olson Dec. ¶20-21. Nor does USPS control the keys. In buildings with apartment-style locking mailboxes, the tenants receive their keys from building management, not USPS, and management retains a key. Lee Dec. Ex. C (Bernardo 149:13-150:5). Rickher Dec. ¶5-6; Landi Dec. ¶33.

### **III. ARGUMENT**

#### **A. Summary Judgment Should Be Granted Because this Court Lacks Subject Matter Jurisdiction to Resolve Plaintiffs' Claims.**

This court may exercise jurisdiction over the Government only pursuant to “a clear statement from the United States waiving sovereign immunity ... together with a claim falling within the terms of the waiver.” *U. S. v. White Mtn. Apache Tribe*, 537 U.S. 465 (2003); *U.S.P.S. v. Flamingo Inds. (USA) Ltd.*, 540 U.S. 736, 744 (2004) (USPS has sovereign immunity)

The Ninth Circuit has instructed that the enactment of the PRA “evinces Congress’s general intent to withdraw judicial scrutiny of postal regulations.” *Currier v. Potter*, 379 F.3d

716, 725 (9th Cir. 2004) (“there is no waiver of immunity, no substantive legal basis and no jurisdiction over claims asserted under Postal Service regulations” in connection with homeless challenge to general delivery). The Ninth Circuit also held that USPS is “exempt from the APA’s general mandate of judicial review of agency actions.” *Id.* Thus, Plaintiffs’ theory of alleged constitutional claims—that USPS is violating POM 631.451 by refusing to deliver mail by centralized delivery to individual receptacles for each hotel room at all SRO Hotels is outside this Court’s jurisdiction and contrary to plaintiffs’ representations to the Court in 2009.<sup>8</sup> Similarly, this Court lacks subject matter jurisdiction over Plaintiffs’ alleged constitutional claims to the extent they rest on an argument that SRO occupants experience a disparate incidence of lost or stolen mail because USPS delivers mail to SRO Hotels by single-point delivery rather than by centralized delivery.<sup>9</sup> Any argument by plaintiffs that they are entitled to relief because of Postal regulations is an argument that this court lacks jurisdiction.

**B. Summary Judgment Should Be Granted Because Plaintiffs Lack Standing.**

To have Article III standing, each plaintiff must prove: (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

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<sup>8</sup>Plaintiffs will undoubtedly argue that USPS must use centralized delivery at SROs because they qualify as “apartments” under USPS regulations. But this claim is within the jurisdiction of the Postal Regulatory Commission, where plaintiffs recently filed this very allegation. Lee Dec. Ex. TT. Plaintiffs also informed the Court that they did not have regulatory claims here. Order on Dft’s Mt. to Dismiss, Dkt. 28, p. 4-5. Even assuming the plaintiffs could pursue a regulatory claim here, their interpretation of USPS’s regulations is tortured. Granholm Dec. ¶10-27; Landi Dec. ¶22-25; Luna Dec. ¶14-17. Plaintiffs’ interpretation should also be rejected because it would nullify other delivery regulations (POM §615.1, 615.2, 631.31, 631.52, and 631.54) since under plaintiffs’ interpretation all properties (which would also include hospitals, prisons and college dorms) with three or more units are apartments would be entitled to demand centralized delivery from USPS. Granholm ¶25-26. Not only is this wrong on the face of the regulations, it would also threaten single-point delivery generally, a disastrous outcome for USPS. Olson Dec. ¶20, Landi Dec. ¶21, Granholm ¶26.

<sup>9</sup>Plaintiffs’ claims regarding lost or stolen mail have not been administratively exhausted. *Ly v. U.S.P.S.*, 2011 WL 1235760 (D.D.C. 2011) (unexhausted lost mail claim subject to dismissal). Moreover, Plaintiffs’ speculation about the cause of any harm makes the claims unripe. *Sierra Forest Legacy v. Sherman*, 2011 WL 204149, \*26 (9th Cir. 2011). Ripeness helps to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.” *Id.* This rationale applies here because no complaints have been exhausted, and the cause of any such complaints is speculative, as is any alleged harm suffered by the Plaintiffs in this action.

(2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs fail to establish standing.

**1. Plaintiffs Cannot Show The Required Injury.**

The City has already acknowledged that it “lacks standing to sue on behalf of citizens in *parens patriae*.” Dkt. #19 at 6:4-7 (Opp. to Mot. to Dismiss). The City alleges a direct financial harm caused by USPS’s method of mail delivery. Comp. ¶4, 9. But plaintiffs’ witnesses, including 30(b)(6) witnesses specifically designated to testify regarding such alleged harms, however, have been unable to describe a single financial harm the City (or any plaintiff) has suffered, and generally could not even identify any SRO hotel occupants whose mail had been stolen or lost in the first instance. Lee Dec. Ex. T (Kelly 49:5-11 (couldn’t identify any SRO resident who ever told HSA their mail had been lost or stolen)); Ex. NN (Walton 112:1-113:7 (unable to identify any instance, hotel, or occupant related to alleged stolen or lost checks); 116:2-117:14 and 123:5-124:4 (unaware either through his job or position on the SRO Task Force of any improperly handled, withheld, opened, lost or stolen mail, or even the identity of any person, hotel, organization or City department or employee that had alleged such problems)); Ex. I (Buckley 47:14-24 (CCSRO never expended any additional funds because of USPS mail delivery methods); 245:5-246:18 (unable to identify or produce any names of persons alleged to have failed to receive mail regarding their health, their benefits or eviction proceedings)); Ex. M (THC 30(b)(6) witness Gaeta 112:23-113:11 (no knowledge of lost mail complaints at THC SRO hotels)); Ex. Q (THC 30(b)(6) witness Hogarth 147:22-25 (no knowledge of harm suffered by THC, which employs all THC and CCSRO employees who work at or with SRO hotels and occupants)); Ex. P (SFTU 30(b)(6) 69:21-25 (unaware of instances where an SFTU member at an SRO hotel did not receive their mail)); Ex. V (Kronenberg 49:19-25 (unaware of City ever being unable to communicate with SRO occupant because of mail delivery problems or practices); 51:4-8 (“I don’t have facts per se, no [to support opinion that USPS hindered the City’s ability to fight homelessness].”); Ex. CC (Ojo 96:4-13 (unaware of increased costs due to mail delivery)).

Plaintiffs allegations of harm being suffered are also belied by their consistent testimony

1 that none of them ever did anything to address the alleged mail problem, including such simple  
 2 efforts as calling the police, calling USPS, installing a locked receptacle for delivery, training  
 3 desk clerks on mail receipt and handling or anything else. Lee Dec. Ex. NN (Walton 112:23-  
 4 113:11); Ex. I (Buckley 270:17-22); Ex. Q (THC 30(b)(6) Hogarth 181:12-17); Ex. V  
 5 (Kronenberg 52:21-55:8); Ex. ZZ (RFAs 104-115). The City's claim that it has had to spend  
 6 City funds because of single-point delivery remains pure speculation after 2 years of discovery.

7 The City's alternative standing theory, namely that USPS allegedly hindered its ability to  
 8 protect the public health of SRO hotel occupants, also lacks evidentiary support. While the  
 9 City's own reports, and numerous complaints it has received about violence, drug use, rodent  
 10 infestation, bed bugs, among other health related problems at SRO Hotels, conclusively  
 11 demonstrate there is a public health, safety and sanitation problem at many SRO Hotels,  
 12 plaintiffs have not established any link to the mode of mail delivery at the hotels. Lee Dec. Ex. K  
 13 (Enisman 39:22-41:2, 54:14-22, explaining her department does not have any information  
 14 linking mail delivery problems to SRO Hotels), Ex. U (Kelly 153:21-154:10, stating he had "no  
 15 way to link the causality" of returned mail to mail delivery problems). Ex. CC (Ojo 53:5-54:7,  
 16 58:24-59:1)(unaware of mail not being delivered), Ex. V (Kronenberg 55:21-56:25 ("I would  
 17 have no way of knowing" and it would be speculation to try and attribute the spread of disease to  
 18 mail delivery problems, a complaint she could not recall hearing). In fact, the scant information  
 19 provided by plaintiffs, even after multiple motions to compel by the Postal Service, tends to  
 20 disprove any such link. Lee Dec. Ex. U-477 (55% of "discontinuances" in food stamps program  
 21 associated with SRO Hotels receiving centralized delivery). Furthermore, the City uses  
 22 alternative communication methods to inform City residents of public health risks and other code  
 23 violations. Lee Dec. Ex. CC (Ojo 53:5-54:7 (hand delivered notices), Ex. J (DerVartanian 70:22-  
 24 72:24) (all DBI notices posted by hand), Ex. S (Kawamura 14:21-19:22 (hand service of orders  
 25 of forced treatment in cases of suspected tuberculosis).

26 **2. Plaintiffs Cannot Show Any Injury Fairly Traceable To The Mode**  
 27 **of Mail Delivery, Rather Than From Intervening Criminal and Negligent**  
 28 **Acts of Third Parties After Delivery.**

Even if plaintiffs had any evidence of injury, they cannot trace it to mail delivery. Under

Article III, a court may act “only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Allen v. Wright*, 468 U.S. 737 (1984). When asked for documentation of mail delivery complaints at specific SRO Hotel addresses or similar confirming information, plaintiffs have been unable to connect mail delivery problems at SRO Hotels to single-point delivery. Lee Dec. Ex. D (CCSF 30(b)(6) dep. 72:17-75:25, admitting “now did they live in an SRO, I don’t know” regarding clients complaining of mail delivery concerns), Ex. I (Buckley 246:2-18) Ex. K (CCSF 30(b)(6) Enisman 54:7-22), Ex. P (SFTU 30(b)(6) 58:6-59:3, 69:16-72:1, 88:5-90:25), Ex. Q (THC 30(b)(6) 147:8-156:17), Ex. S (CCSF 30(b)(6) 94:7-103:21), Ex. T (Kelly 49:5-11), Ex. V (Kronenberg 49:18-25), Ex. LL (HRC 30(b)(6) 48:16-53:11), Ex. MM (CCSF 30(b)(6) 118:1-9), Ex. NN (Walton 111:2-112:7). Plaintiffs are unable to carry their burden to show the alleged injury is traceable to the use of single-point delivery.

Moreover, plaintiffs concede their claims are based not on actions of USPS, but rather on intervening actions of third parties, including SRO hotel managers, desk clerks, and other occupants, after USPS has delivered the mail. Comp. ¶17-18, 24. Although Plaintiffs claim that the method of mail delivery creates an environment that is conducive to third-party mischief, *see* Comp. ¶ 2, that allegation alone is insufficient to establish causation. *See E. Ky. Welfare*, 426 U.S. at 42-43 (finding it “purely speculative” that plaintiffs’ injuries can be traced to a regulation alleged to “encourage” discriminatory third-party behavior when such behavior may be equally consistent with independent decisions by the third parties).<sup>10</sup>

Nor can the behavior of the third parties in question be fairly attributed to USPS. Private action can be regarded as state action only when there is “willful participation” by the government, *Sutton v. Provid. St. Joseph Med. Ctr.*, 192 F.3d 826, 843 (9th Cir. 1999), which is absent in this case. In the centuries-old history of USPS, it has gone to great efforts at substantial

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<sup>10</sup> Relying on *E. Ky. Welfare*, the City made this same argument in an Equal Protection challenge brought by a resident of an SRO against the City’s Uniform Visitor Policy, and the Court agreed, dismissing the case for lack of standing. RJN 15.

1 expense to protect the sanctity of the mail. Lee Dec. Ex. HHH; Granholm ¶28-29. Here, USPS  
 2 has notified all SRO Hotels in San Francisco that mishandling or theft of mail is illegal. Rickher  
 3 Dec. ¶28, Ex. 1. Thus, Plaintiffs fail to meet the Article III standing requirement of causation.  
 4 *See E. Ky. Welfare*, 426 U.S. at 41-42 (denying standing because a suit was brought against the  
 5 Department of Treasury but the complained-of actions were taken by private hospitals); *Warth v.*  
 6 *Seldin*, 422 U.S. 490 (1975) (denying standing because low-income plaintiffs failed to show their  
 7 injury was necessarily attributable to or caused by the city ordinance).

### 8 **3. Plaintiffs Cannot Show that the Claimed Injuries Are Redressable.**

9 Given the indirect nature of the alleged harm, Plaintiffs must satisfy a high standard to  
 10 prove that a favorable decision will redress their injury. Indirect injury makes it “substantially  
 11 more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted  
 12 injury was the consequence of the defendants’ actions, or that prospective relief will remove the  
 13 harm.” *Warth v. Seldin*, 422 U.S. 490, 505 (1975). When, as here, the allegation is that a  
 14 government regulation merely “encourages” problematic behavior by third-parties, it is “purely  
 15 speculative” to assume that relief meant to “discourage” such actions will in fact remedy the  
 16 problem. *See E. Ky. Welfare*, 426 U.S. at 42-43.

17 Plaintiffs cannot meet their burden to prove that centralized delivery will reduce the  
 18 incidence of mail theft or misdelivery at SRO Hotels. First, although SRO Hotel occupants  
 19 allegedly comprise 4% of the population of San Francisco, only 1.4% of mail delivery complaints  
 20 originate at SRO Hotels. Rickher Dec. ¶10. Mail theft in San Francisco is a greater problem at  
 21 apartments that receive centralized delivery. Rickher Dec. ¶5, 23-27; Lee Dec. Ex. HH (Rickher  
 22 19:19-20:14, 67:1-8). Furthermore, mail theft complaints are disproportionately represented at  
 23 centralized delivery SRO Hotel location; 362 complaints (55.7%) were made at the 172 SRO  
 24 Hotels already receiving centralized delivery, while the remaining 44.3% of claims were made at  
 25 the 324 SRO Hotels receiving single point delivery. Rickher Dec. ¶15-20. Mail delivery  
 26 complaints are *more numerous* at SRO Hotels already receiving the form of mail delivery  
 27 plaintiffs argue would *reduce* mail delivery complaints. Finally, individual mailbox keys are  
 28 distributed and copies are held by building management, not USPS. Lee Dec. Ex. C (Bernardo

1 149:13-150:5), Ex. Z (Mallery 12:2-14:10); Rickher Dec. ¶5; Landi Dec. ¶33. As a result, when  
 2 SRO Hotel employees at centralized delivery locations desire to steal or otherwise interfere with  
 3 receipt of mail by a hotel occupant, they may do so by using their copy of the key to commit  
 4 these illegal acts. Theft of mail from centralized delivery locations with individual locking  
 5 mailboxes is the most prevalent because thieves view these mailboxes opportunistically as a  
 6 "volume attack." Rickher Dec. ¶5.

7 Not only is plaintiffs' claim speculative, but the only evidence in this case contradicts  
 8 plaintiffs' claims. Therefore, Plaintiffs cannot show that the alleged injuries are redressable.

9 **C. The First Amendment Does Not Require USPS To Provide Centralized Delivery**  
 10 **to SRO Hotel Occupants Already Receiving Direct Mail Delivery to Their Hotels by**  
 11 **USPS Six Days Per Week.**

12 Under a tripartite forum analysis of whether an alleged burden on First Amendment rights  
 13 violates the Constitution, courts (1) determine the relevant forum in which the plaintiffs seek to  
 14 exercise their First Amendment rights, (2) decide whether that forum is public or nonpublic in  
 15 nature, and (3) apply the level of scrutiny appropriate to the kind of forum found to exist. Where  
 16 no public forum is involved and the alleged restrictions on speech are viewpoint neutral, as is the  
 17 case here, "[t]he Government's decision to restrict access to a nonpublic forum need only be  
 18 reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius v.*  
*NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985); *Currier*, 379 F.3d at 727.

19 **1. The Relevant Forum is Centralized Delivery to SRO Hotels in San Francisco.**

20 In *Currier*, plaintiff homeless persons claimed it was difficult for them to receive mail  
 21 altogether in that they lacked a physical address to which their mail could be delivered and USPS  
 22 denied their requests to either be provided free postal mailboxes or have their mail delivered via  
 23 general delivery to a more localized branch than Seattle's main post office, which was many  
 24 miles away from where some homeless persons stayed. *Currier*, 379 F.3d at 722-23, 737. The  
 25 Ninth Circuit held that the relevant forum is "appropriately limited to the general delivery mail  
 26 system, not the mail system as a whole," because plaintiffs sought greater access to that general  
 27 delivery mail system. *Id.* at 727-28. Unlike the homeless persons in *Currier*, plaintiffs do not  
 28 claim that USPS is denying SRO hotel occupants access to the mail system completely because

USPS provides SRO Hotels with the same six day per week delivery it does to all buildings. Comp. ¶17. Here, Plaintiffs contend that USPS has violated SRO Hotel occupants' and the City's right to free speech by refusing to convert the mode of delivery to centralized delivery at all SRO Hotels currently receiving daily delivery direct to the hotel. Comp. ¶42, Lee Dec. Ex. RR, SS. Thus, centralized delivery to San Francisco SRO Hotels<sup>11</sup>, is the relevant forum at issue.

## **2. Centralized Delivery to a Hotel Is Not a Public Forum.**

Supreme Court and Ninth Circuit precedent establishes that centralized delivery to SRO Hotels can only be construed as a non-public forum. *U.S.P.S. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 128 (1981) (residential letter boxes are not a limited public forum); *Currier*, 379 F.3d at 728 (“If a forum does not fit into either two public categories, it is a nonpublic forum”). Centralized delivery to SRO Hotels in San Francisco is not a traditional public forum. Traditional public fora “comprise those areas—such as streets and parks—that ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions.’” *Id. citing Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quotations and citation omitted). The Supreme Court has rejected expanding the scope of traditional public fora beyond “its historic confines.” *Id. citing Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998)); *see also U.S. v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (refusing to declare Internet access in a public library either a traditional or designated public forum). Relying on Supreme Court cases *Perry*, *Forbes*, *Am. Library Ass'n* and its pronouncement in *Blount v. Rizzi* that the government could eliminate USPS altogether if it wanted, the Ninth Circuit summarily determined it would not “declare a particular form of delivery a traditional public forum.” *Currier*, 379 F.3d at 729.

Nor can centralized delivery to SRO Hotels in San Francisco be considered a designated or limited public forum. A designated public forum can only be created with the “government’s

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<sup>11</sup>Plaintiffs only demand centralized delivery to SRO Hotels in San Francisco, not to all occupants receiving single point delivery, such as students living in college dorms or seniors living in assisted living communities.

express dedication of its property to expressive conduct." *Currier*, 379 F.3d at 728, *citing Perry*, 460 U.S. at 45-46 (1983). The Supreme Court has squarely rejected the notion that delivery to a particular delivery box type could constitute a limited public forum. *Greenburgh*, 453 U.S. 114, 128 (residential letter boxes are not a limited public forum); *Perry*, 460 U.S. at 46 (teacher mailboxes in a school district's mail system not a public forum); *U.S. v. Kokinda*, 497 U.S. 720, 729-230 (1990) (sidewalk had not been dedicated to expressive activity by USPS). The Ninth Circuit concurs. *Currier*, 379 F.3d at 728-731 (neither no-fee postal boxes nor general delivery qualified as a designated public forum); *Jacobsen v. U.S.P.S.*, 993 F. 2d 649, 656 (9th Cir. 1992) (postal sidewalks); *Monterey Cty. Comm. v. U.S.P.S.*, 812 F.2d 1194, 1198 (9th Cir. 1987) (postal sidewalk).

Therefore, centralized delivery to SRO Hotels in San Francisco can only constitute a non-public forum.

### **3. The Decision to Deny the City's Demand to Mass Convert Delivery to Approximately 300 SRO Hotels Was Reasonable.**

Access to a non-public forum may be restricted, as long as that restriction is reasonable and not viewpoint-based. *Cornelius*, 473 U.S. at 808. Moreover, to meet the low level reasonableness standard, the decision to restrict access to the non-public forum "need not be the most reasonable or the only reasonable limitation." *Id.* This standard, which is almost always satisfied, is easily met in this case.

First, it is undisputed that the mode of delivery decision is viewpoint-neutral. All mail being delivered to SRO Hotels receives the same treatment by USPS irrespective of its content or the viewpoint(s) it may assert. Courts have given USPS broad discretion to administer content-neutral delivery regulations. *See, e.g., Greenburgh*, 453 U.S. at 131, fn. 7 (content neutral Postal regulations are reasonable in connection with USPS's legitimate goal to create a nationwide system of efficient and economical delivery); *Egger v. U.S.P.S.*, 436 F. Supp. 138 (W.D. Va. 1977) (delivery regulations are non-discriminatory and USPS interpretation of its regulations controls regarding delivery to different types of university housing); *Grover City v. U.S.P.S.*, 391 F. Supp. 982 (C.D. Cal. 1975) (delivery regulations are not discriminatory but, instead, are reasonably related to carrying out efficient mail delivery services at reasonable costs); *Parsons v.*

1 *U.S.P.S.*, 380 F. Supp. 815 (D.N.J. 1974) (summary judgment granted because denial of door-to-  
2 door delivery within USPS discretion to maximize efficiency).

3 Second, USPS's decision to deny the request to *en masse* convert the mode of delivery to  
4 the approximately 300 SRO Hotels currently receiving single-point delivery is reasonable  
5 because it is less expensive and more efficient for USPS to continue to provide single-point  
6 delivery to 300 buildings than to provide centralized delivery to 14,000 individual mailboxes.  
7 Bradley Dec. ¶¶4-5, 28-32, Ex. A; Landi Dec. ¶¶30-34; Olson Dec. ¶¶7-10, 16-20.

8 Here, it is not only the substantial \$2.3 million *annual* projected cost to provide the  
9 extended delivery to SRO Hotels in San Francisco that evidences the reasonableness of USPS's  
10 position, but the substantially greater cost exposure USPS would face if it gave in to Plaintiffs's  
11 demand that the mode of delivery must be changed because it violates the recipients'  
12 constitutional rights. Plaintiffs' demand challenges the very existence of single-point delivery,  
13 for if an SRO hotel occupant's rights in San Francisco require centralized delivery, then USPS  
14 faces the same exposure regarding all single-point deliveries to all persons on a nationwide basis,  
15 a total of at least 3.3 million mail customers, and a cost to USPS of approximately \$300 million  
16 per year. Bradley Dec. ¶¶5-6. Nothing could be more reasonable than USPS's aversion to setting  
17 such a precedent by agreeing to plaintiffs' demand.

18 Moreover, cost and efficiency are only the tip of the iceberg in terms of the reasonableness  
19 of USPS's position. The City's hotel conversion ordinance specifies that SROs are hotels, not  
20 apartments, and the City itself assesses "hotel" taxes and/or "hotel" license fees against the vast  
21 majority of SRO Hotels receiving single-point delivery, raising millions in revenue in the  
22 process. If the City taxes, classifies and treats the SRO Hotels as hotels, then certainly it is  
23 reasonable for USPS to similarly classify the buildings as hotels rather than apartments.

24 Similarly, the hotels themselves have self-identified themselves as hotels, and not as  
25 apartments, for decades. And it makes sense that the buildings do so, for the physical  
26 characteristics of the units (single rooms lacking kitchens and typically lacking even a bathroom),  
27 plainly resemble a hotel space, not an apartment. Apartment tenants typically have to pay  
28 security deposits and sign long term leases; SRO Hotel occupants do not. Lee Dec. Ex. R

(Jacobson 262:8-263:2). The fact that the occupants do not appear to pay security deposits or sign long term leases committing themselves to the building is also entirely consistent with the City and the hotels themselves classifying the buildings as hotels, rather than as apartments. And unless this Court is prepared to say that treating hotels differently than apartments cannot be said to be rational, even though the two kinds of structures present different costs and complications because of the transience of the occupants, plaintiffs must lose. In any event, the fact that USPS treats the buildings in the same way they self-identify and are treated by the City only further establishes the reasonableness of USPS's decision.

**D. The Equal Protection Clause Does Not Require USPS To Provide Centralized Delivery to SRO Hotel Occupants Already Receiving Direct Mail Delivery to Their Hotels by USPS Six Days Per Week.**

The Equal Protection Clause generally requires that persons who are similarly situated be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). A plaintiff may establish an Equal Protection claim in two ways. First, plaintiff must prove the defendant has intentionally discriminated against plaintiff on the basis of the plaintiff's membership in a protected class. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001). Under this theory, a plaintiff must show that the defendant's actions were a result of the plaintiff's membership in a suspect class, such as race. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Second, when the challenged governmental action does not involve a suspect classification, a plaintiff may establish an Equal Protection claim by showing that similarly situated individuals were intentionally treated differently without a rational relationship to a legitimate state purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004). Plaintiffs claim that there is an equal protection violation because USPS will not agree to provide the same mail delivery service to SRO Hotels as it provides to "other apartments" where wealthier San Franciscans reside. Comp. ¶ 37-38.

**1. Because There is Suspect Classification, Rational Basis Review Applies To Plaintiffs' Equal Protection Claims.**

Plaintiffs do not allege USPS's decision about mode of delivery at SRO Hotels is based on race or any other protected characteristic. Instead, their claim is that SRO Hotel occupants in

San Francisco do not receive centralized mail delivery but all apartment residents in San Francisco do. Comp. ¶ 30-31. This comparison does not describe a suspect classification. USPS does not classify by wealth, and wealth is not a suspect classification in any event.<sup>12</sup> *NAACP, LA v. Jones*, 131 F. 3d 1317, 1321 (9<sup>th</sup> Cir. 1997) (wealth not a suspect class). Because residency in a hotel is not a suspect class, rational basis analysis governs. Additionally, as discussed above, there is no public forum at issue here. When there is no public forum, rational basis review applies to an Equal Protection challenge relating to “expressive conduct.” *Currier*, 379 F.3d at 731-32; *Monterey Cty. Comm.*, 812 F. 2d at 1199-1200.

**2. USPS’s Decision Not to Extend Centralized Delivery to All SRO Hotels Is Rationally Related to the Legitimate Purposes of Efficiency and Economy.**

“A classification must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citations and internal quotation omitted); *see also Gonzales v. Raich*, 545 U.S. 1, 9-10 and 22 (2005) (reversing Ninth Circuit and finding, the “question before us, however, is not whether it is wise to enforce the statute to the local facts of this case; instead, it is whether there is a rational basis for [it].”). Rational basis review is limited to whether the government “could have had a legitimate reason for acting as it did.” *Currier*, 379 F.3d at 732 (citations). In *Currier*, the Court found that USPS’s limitation of general delivery service was rationally related to avoiding costs and inefficiencies that would have flown from extending general delivery service as demanded. *Id.* The justifications here are even stronger.

First, USPS’s decision not to convert the mode of delivery at all SRO Hotels receiving single-point delivery (as they have received for decades) is rationally related to USPS’s legitimate purpose of increasing its operational efficiency and minimizing its operational costs. *Currier*, 379 F.3d at 732 (limitation of general delivery is rational response to inefficiencies and

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<sup>12</sup>To the extent plaintiffs allege this case concerns discrimination based on wealth, the claim is unfounded because USPS provides centralized delivery to elderly, disabled, and other residents of apartment buildings in San Francisco, including apartments in the Tenderloin, Mission, and South of Market and those listed by the Mayor's Office as "affordable" housing. Wang Dec. ¶ 10-14.

1 increased costs); *Greenburgh*, 453 U.S. at 133 (concern with maintaining efficient operations  
 2 provided reasonable basis for denying First Amendment claim). This is USPS's Congressional  
 3 mandate. USPS's regulations are a reasonable, rational tool for USPS to use to maximize  
 4 efficiency of its operations. By providing single-point delivery to hotels, including the  
 5 approximately 300 SRO Hotels, under POM §615.2, USPS will maintain uniformity and stability  
 6 in its delivery operations. Granholm Dec. ¶¶20-21; Olson Dec. ¶¶7-9.

7 Second, it bears noting that Plaintiffs would seek to have this Court order USPS to sort  
 8 and deliver mail to approximately 14,000 SRO hotel units that USPS currently serves by single-  
 9 point delivery only. Bradley Dec. ¶4. It is undisputed that this additional workload would  
 10 decrease USPS's operational efficiency. But beyond that, the "constantly shifting" transient SRO  
 11 Hotel occupancies themselves will lead to a "delivery nightmare" if the conversions are required.  
 12 Olson Dec. ¶¶7-20; Granholm Dec. ¶¶15-26.

13 USPS's financial crisis is also undisputed and should end any debate that remains over  
 14 whether USPS has any rational basis to support its decision. Lee Dec. Ex. R (Jacobson 290:18-  
 15 292:25). USPS has been in a cost-cutting mode for several years, attempting to overcome multi-  
 16 billion dollar annual operating losses. According to Prof. Bradley, providing centralized delivery  
 17 at all SRO Hotels in San Francisco would cost USPS an additional \$2.3 million *annually*.  
 18 Bradley Dec. ¶4. And if the reasoning of plaintiffs here extended to require centralized delivery  
 19 to all properties currently receiving single-point delivery nationally, the resulting costs to USPS  
 20 approximately \$300 million *annually*. Bradley Dec. ¶5.

21 **E. Neither the Right of Association Nor the Right of Privacy Require Centralized**  
 22 **Delivery of Mail to SRO Hotels.**

23 There is substantial overlap between the "right of privacy" and the "freedom of  
 24 association." *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1499-1500, fn. 8 (9th Cir. 1987)  
 25 (citations). There are two aspects of the "freedom of association:" (1) a "freedom of intimate  
 26 association," which protects highly personal relationships from unjustified state interference, and  
 27 (2) a "right to associate for expressive purposes," which protects individuals seeking to "associate  
 28 with others in pursuit of a wide variety of political, social, economic, educational, religious, and  
 cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 622 (1984).

1 This is not a case in which anyone alleges that the government is trying to learn or  
2 disclose associations of any affected SRO hotel occupants or any private matter; instead, the  
3 claim is that the government has failed to take steps constitutionally mandated to safeguard those  
4 associations.<sup>13</sup> The claims fail because there is no constitutional duty to prevent a third party  
5 from violating a constitutional right. The affirmative invasion of the freedom of association and  
6 right of privacy alleged in the complaint is committed by others, not USPS. To hold USPS  
7 constitutionally responsible for others' conduct would be unprecedented.

8 Moreover, SRO hotel occupants' rights of association may be directly burdened by a  
9 variety of private and public conduct. Private actors such as SRO hotel desk clerks are alleged in  
10 the complaint to unlawfully learn occupants' associations and use them to threaten or retaliate  
11 against the occupant. Such has been claimed against the Tenderloin Housing Clinic, the  
12 corporate parent of Central City SRO Collaborative, by an occupant at one of its SRO Hotels, the  
13 All Star Hotel. Rickher Dec. ¶29; Lee Dec. Ex. KK-489 at pp. 7-11. Furthermore, local  
14 government activity, such as San Francisco's SRO Hotel Visitor Policy restricting occupants to a  
15 maximum of two daytime visitors to their room, also burdens freedom of association. An  
16 occupant of an SRO hotel cannot have three reporters visit during the day to discuss the  
17 deplorable living conditions at the SRO hotel because San Francisco won't allow it. Lee Dec. Ex.  
18 KK (Shaw 235:2-25, 236:20-238:16). An occupant is *precluded* by the City's visitor policy from  
19 being able to have an intimate relationship with an overnight visitor for more than eight nights  
20 per month. *Id.* But there is no evidence of any affirmative conduct by USPS to violate any hotel  
21 occupant's right to privacy or either restrict or compel disclosure of any SRO hotel occupant's  
22 rights of association.

23 Finally, as noted earlier, there is also no evidence to support the implicit claim that mail  
24 delivery to individual locking mailboxes would eliminate the risk of mail security breaches. In  
25

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26 <sup>13</sup>The complaint alleges that the method of mail delivery at SRO Hotels impermissibly  
27 burdens occupants' freedom of association because, after delivery, their mail is at risk of being read  
28 by their neighbors, landlords and landlords' employees, which has lead to SRO hotel occupants  
facing harassment and retaliation. Comp. ¶ 46-48. The complaint has similar allegations regarding  
SRO hotel occupants' constitutional rights of privacy. *Id.* ¶ 54-55.

fact, the evidence is to the contrary. Rickher Dec. ¶5-20; Olson Dec. ¶21-22. At apartment buildings, landlords have keys to the individual mailboxes of the tenants. Landi Dec. ¶33. At apartment buildings, mailbox break-ins are also a problem. Rickher Dec. ¶5-6; Lee Dec. Ex. LL (HRC 30(b)(6) dep. 53:12-59:11); Ex. P (SFTU 30(b)(6) dep. 81:13-82:23). At millions of locations around the country, mail is delivered to unlocked containers on individual residences or curbside containers without locking devices. Landi Dec. ¶33; Lee Dec. Ex. R (Jacobson 203:15-18). Mail security risks are inherent. The Constitution does not require affirmative steps by USPS to safeguard the security of mail at any point of delivery in the system, particularly after delivery has taken place.

#### IV. CONCLUSION

This motion should be granted.

- There is no Constitutional prescription for a particular method of mail delivery, and USPS's delivery regulations do not create the basis for finding any Constitutional duty to delivery using a particular method of mail delivery.
- Plaintiffs lack standing because they cannot satisfy their burden to show they have been harmed by the method of mail delivery, as opposed to the subsequent acts of third parties, or to show that a change in the mode of mail delivery will redress any alleged harm.
- USPS's decision not to convert 300 hotels into 14,000 delivery points is reasonable and thus permissible under the First Amendment because it will add millions in delivery costs to an organization facing financial crisis and because of the inefficiencies and instability in the delivery operations that forced conversions would create.
- USPS's decision not to convert 300 hotels into 14,000 delivery points does not violate Equal Protection because the decision is rationally related to USPS's legitimate interests in increasing efficiency and reducing costs.
- USPS's decision does not violate associational or privacy rights and the subsequent conduct of third parties does not create a Constitutional duty requiring USPS to change the mode of delivery at the SRO Hotels.

Respectfully submitted,  
MELINDA HAAG  
United States Attorney

Dated: September 8, 2011

/s/  
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12 SAN FRANCISCO DIVISION

13 CITY AND COUNTY OF SAN  
14 FRANCISCO, CENTRAL CITY SRO  
15 COLLABORATIVE, SAN FRANCISCO  
TENANTS UNION, and HOUSING  
RIGHTS COMMITTEE OF SAN  
FRANCISCO,

16 Plaintiffs,

17 v.

18 UNITED STATES POSTAL SERVICE;  
19 JOHN E. POTTER, MICHAEL DALEY  
and NOEMI LUNA, in their official  
20 capacities,

21 Defendants.

No. 09-1964 JSW

**FEDERAL DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO DISMISS  
COMPLAINT**

22 Date: September 4, 2009  
23 Time: 9:00 a.m.  
24 Ctrm: 11, 19<sup>th</sup> Floor  
25  
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27  
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1           **PLEASE TAKE NOTICE** that defendant United States Postal Service, (“USPS” or  
2 “Postal Service”) and individual defendants John Potter, Michael Daley, and Noemi Luna will  
3 move this Court on **September 4, 2009**, at 9:00 a.m. in Courtroom 11, 19th Floor, United States  
4 Federal Court House, 450 Golden Gate Avenue, San Francisco, California, before the Honorable  
5 Jeffrey S. White, U.S. District Judge, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for an  
6 order dismissing each and every claim of Plaintiffs’ Complaint. This motion is based on this  
7 notice, the memorandum of points and authorities, and all the matters of record filed with the  
8 Court, and such other evidence as may be submitted.

9           **ISSUES TO BE DECIDED**

10           1. Does the City and County of San Francisco (“City”) have standing to bring the  
11 claims alleged in the complaint on behalf of its citizens?

12           2. Do Plaintiffs satisfy the constitutional minimums of causation and redressability for  
13 standing to bring this Complaint against USPS?

14           3. Should this Court dismiss Plaintiffs’ claims because Plaintiffs must bring them  
15 under the exclusive, statutorily mandated regime – the Postal Reorganization Act, as most  
16 recently modified by the Postal Accountability and Enhancement Act?

17           4. Does a justiciable, actual controversy exist between the City and USPS for purposes  
18 of declaratory judgment?

19           5. Should the individual defendants be dismissed from this case because the only  
20 proper defendant is USPS?

21           **I. INTRODUCTION**

22           The Court should grant the USPS’s motion to dismiss for four reasons. First, the City  
23 lacks standing to bring claims on behalf of its residents. Second, Plaintiffs’ complaint does not  
24 satisfy the constitutional minimums for standing to sue USPS because the alleged harms resulted  
25 from actions by third parties – namely, the owners or managers serving as agents of the owners of  
26 the single room occupancy residential hotels (“SROs”). Third, because Congress has created an  
27 exclusive statutory scheme for addressing Plaintiffs’ first four claims, these claims  
28 must be dismissed. Fourth, no justiciable, actual controversy exists between the City and USPS;

thus, this Court lacks jurisdiction to provide declaratory relief.

Finally, the individual defendants should be dismissed because the real party in interest is USPS, and the individuals sued in their official capacities add nothing to the litigation.

## **II. FACTUAL BACKGROUND**

### **A. SROs and the City's Ordinance**

SROs are buildings in which tenants rent single rooms, usually without a private bathroom or kitchen. SROs are not necessarily considered apartment buildings under USPS regulations. Under the USPS's regulatory scheme, SROs fit under regulations governing "hotels, schools, and similar places." Postal Operations Manual ("POM") § 615.2<sup>1</sup>; Domestic Mail Manual ("DMM") § 508.1.7.2.<sup>2</sup> At most SROs, USPS delivers mail to a single point, such as a desk clerk or receptacle ("single point delivery"). Compl. ¶¶ 2, 17.

In 2006, the City enacted the Residential Hotel Mail Receptacle Ordinance ("Ordinance"), codified at S.F. Admin. Code § 41E.3. Compl. ¶ 27. The Ordinance requires the owners of SROs to install separate mail receptacles for each residential unit. *Id.* Despite the passage of the Ordinance, most of the owners have failed to install separate mail receptacles for their units. *Id.*

### **B. USPS's Voluntary Expanded Delivery and Subsequent Cessation**

Prior to December, 2008, some USPS employees in San Francisco agreed to convert the mode of delivery from single point delivery to individual mail receptacles ("expanded delivery") at some SROs after the owners had installed receptacles.

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<sup>1</sup> POM § 615.2 provides: "Mail Addressed to Persons at Hotels, Schools, and Similar Places. Mail addressed to persons at hotels, schools, and similar places is delivered to the hotel or school. If the addressee is no longer at that address, the mail is redirected to his or her current address by the hotel or school. If the forwarding address is unknown, the mail is returned to the Post Office." The POM consists of regulations of the Postal Service. 39 C.F.R. § 211.2(a)(2).

<sup>2</sup> DMM § 508.1.7.2 provides: "Hotel or School. Mail addressed to a person at a hotel, school, or similar place is delivered to the hotel, school, etc. If the addressee is no longer at that address, the mail must be redirected to the current address, if known, or endorsed appropriately and returned by the institution to the Post Office." The DMM consists of regulations of the Postal Service. 39 C.F.R. § 211.2(a)(2).

1 In November, 2008, USPS through San Francisco Postmaster Noemi Luna explained in a  
 2 letter to the City's Department of Building Inspection that the conversion of delivery to  
 3 individual mail receptacles at SROs was contrary to postal regulations and expensive.

4 In December, 2008, San Francisco Postmaster Noemi Luna informed the Department of  
 5 Building Inspection that USPS would no longer deliver to individual mail receptacles beginning  
 6 on January 5, 2009. Luna stated that the City's ordinance is preempted "to the extent that it  
 7 attempts to frustrate or interfere with the operations of the Postal Service." *Id.* at ¶ 29.

8 In January, 2009, USPS employees in San Francisco discontinued the practice of  
 9 expanded delivery and reverted to single point delivery at some SROs with individual mail  
 10 receptacles. Compl. ¶ 29.<sup>3</sup>

#### 11 C. Misconduct on the Part of SRO Owners

12 Despite the passage of the City's Ordinance, SRO owners have steadfastly refused to  
 13 install individual mail receptacles. Compl. ¶ 9f. An unspecified number of SRO tenants have  
 14 complained that they do not always receive all of their mail. Some claim that SRO managers or  
 15 desk clerks have violated their privacy by reading their mail. Compl. ¶¶ 24-25. One tenant  
 16 claimed that her manager required her to claim her mail during specified time frames, causing her  
 17 to use the stairs more frequently than her disability affords. Compl. ¶ 23. Other tenants have  
 18 told plaintiffs that they did not receive potential governmental benefits, faced eviction, or  
 19 suffered medical, financial, or emotional consequences because they did not receive one or more  
 20 pieces of mail. Compl. ¶¶ 17-22.

#### 21 D. Plaintiffs' Allegations

22 Plaintiffs allege that USPS now directs mail carriers to leave mail at the front desk of  
 23 SROs or near their entryways. Compl. ¶ 2. Plaintiffs allege that this policy is inconsistent with  
 24 the mail delivery service provided at other apartment complexes, whose residents are more  
 25 affluent. Compl. ¶¶ 3, 5. Plaintiffs allege that the mail of some SRO residents has been stolen,  
 26

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27 <sup>3</sup> Paragraph 29 of the Complaint fails to note that single point delivery was not reinstated  
 28 at those SROs whose delivery to apartment style receptacles had been in effect for more than 90  
 days, a limit specified in POM § 631.7 – *Correction of Improper Mode of Delivery.*

1 mis-delivered, or withheld by SRO clerks after delivery by the mail carrier. Compl. ¶ 2.  
 2 Plaintiffs also allege that some residents do not receive federal benefits information or checks,  
 3 communication of personal medical information, private letters, and other mail. Id. Plaintiffs  
 4 claim that the City must “pick up the slack” in providing public services, which causes increased  
 5 expenditures. Id. ¶ 9(a).

#### 6 E. Plaintiffs’ Complaint

7 Plaintiffs’ Complaint alleges five claims: First Claim (Equal Protection), Second Claim  
 8 (Free Speech), Third Claim (Freedom of Association), Fourth Claim (Right to Privacy), and Fifth  
 9 Claim (Declaratory Relief).

### 10 III. THE COURT SHOULD GRANT DEFENDANTS’ MOTION TO DISMISS

#### 11 A. Standards for Motion to Dismiss for Lack of Jurisdiction

12 For purposes of a motion to dismiss for lack of jurisdiction, this Court must accept as true  
 13 all alleged facts that have a plausibility of truth. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949  
 14 (2009). However, this Court is not required to accept as true mere “conclusory statements” that  
 15 purport to support “threadbare” causes of action. Id., citing Bell Atlantic Corp. v. Twombly, 550  
 16 U.S. 544, 555 (2007). Therefore to survive this motion to dismiss, the complaint must contain  
 17 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Id.  
 18 A claim has “facial plausibility” when plaintiff pleads factual content that allows court to draw a  
 19 reasonable inference that defendant is liable for misconduct alleged. Id.

#### 20 B. The City Lacks Standing to Bring Its Constitutional Claims on Behalf of its Residents

21 The City lacks standing to sue for vindication of the rights of or redress harms inflicted  
 22 upon some segment of its population. In the Ninth Circuit, cities and municipalities do not have  
 23 standing to sue on behalf of their citizens as *parens patriae*. In In re Multidistrict Vehicle Air  
 24 Pollution, 481 F.2d 122 (9th Cir. 1973), cert. denied, 414 U.S. 1045 (1973), the court stated that,  
 25 “the federal government and the states, as the twin sovereigns in our constitutional scheme, may  
 26 in appropriate circumstances sue as *parens patriae* to vindicate interests of their citizens. On the  
 27 other hand, political subdivisions such as cities and counties, whose power is derivative and not  
 28 sovereign, cannot sue as *parens patriae*, although they might sue to vindicate such of their own

1 proprietary interests as might be congruent with the interests of their inhabitants.” (Citations  
 2 omitted); see also City of Rohnert Park v. Harris, 601 F.2d 1040 (9th Cir. 1979) (City did not  
 3 have standing to sue to vindicate interests of its members). Suing as *parens patriae* is the only  
 4 way the City might be suing on behalf of its residents, and therefore claims one through four  
 5 should be dismissed as to the City.

6 **C. The Remaining Allegations Do Not Satisfy the Constitutional Minimums to**  
 7 **Confer Standing Upon Them Against USPS**

8 The remaining plaintiffs also lack standing to sue USPS because the harms alleged lack  
 9 sufficient causal connection with actions of USPS and thus are not redressable by this Court.  
 10 The irreducible constitutional minimum of standing requires that plaintiff has (1) suffered an  
 11 injury in fact, (2) that there be a causal connection between the injury and conduct complained of  
 12 so that the injury is fairly traceable to the challenged action of the defendant and not the result of  
 13 the independent action of some third party who is not before the court; and (3) that it be likely, as  
 14 opposed to merely speculative, that injury will be redressed by a favorable decision. See Lujan v.  
 15 Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). Under the Supreme Court’s standing  
 16 jurisprudence and the requirements articulated in Twombly and Iqbal, Plaintiffs’ complaint fails  
 17 to show that the alleged harms are caused by USPS and that any injunctive remedy of this Court  
 18 against USPS can redress those harms.

19 **1. Causal Connection**

20 Plaintiffs’ complaint fails to show any causal connection between alleged harms and  
 21 USPS’ actions because these harms are caused by third parties not before the court, not Postal  
 22 Service provision of delivery service. Compl. ¶¶ 17-18. If the harms alleged are caused by a  
 23 third party, the plaintiff cannot sue defendant for those harms. Specifically, harm caused by  
 24 independent third party action, rather than government action or policy, are insufficient to confer  
 25 standing upon plaintiffs to sue the government. The Supreme Court has a long and consistent  
 26 history of sustaining these requirements. In Simon v. Eastern Kentucky Welfare Rights  
 27 Organization, 426 U.S. 26, 42 (1976), the Court denied standing because the purported injury  
 28 “result[ed] from the independent action of some third party not before the court.” The Court held  
 that poor individuals who had been denied service at particular hospitals lacked standing to sue

1 the IRS over their policy of providing tax breaks to hospitals that did not serve indigents, since  
 2 they could not show that any changes in the tax policy would cause the hospitals to change their  
 3 policies regarding indigent individuals. Id. See also Warth v. Seldin, 422 U.S. 490 (1975) (low-  
 4 income individuals lacked standing because plaintiffs failed to show that their alleged injury,  
 5 inability to obtain adequate housing within their means, was not necessarily attributable to or  
 6 caused by the city ordinance they sought to challenge); Allen v. Wright, 468 U.S. 737 (1984)  
 7 (parents of African-American children attending public schools lacked standing to challenge  
 8 IRS's under-enforcement of prohibitions against tax exemptions for discriminatory schools  
 9 because fact that schools could carry on their policies regardless of the IRS's tax treatment  
 10 eliminated requisite causal connection).

11 As in Simon, Warth, and Allen, the plaintiffs' harms are caused by a third party not  
 12 before the Court. Plaintiffs do not allege that USPS fails to deliver SRO tenants' mail. Rather,  
 13 Plaintiffs allege that USPS delivers the mail to SROs, and that at some point after delivery, the  
 14 "mail will be stolen or misdelivered or otherwise 'disappear.'" Compl. ¶2. These harms are  
 15 caused by third party actions and do not flow from the act of delivery by USPS.<sup>4</sup> Indeed,  
 16 Plaintiffs concede that in many instances the third party causing the alleged harm is the SRO  
 17 owner or desk clerk, who withhold or read their tenants' mail. Compl. ¶9(e). Moreover, the  
 18 proposed installation of mailboxes in SROs would not prevent SRO owners from accessing,  
 19 withholding, and/or misdelivering tenants' mail because they would have access to those  
 20 mailboxes. Because the alleged harms result from SRO owner interference with the mail after it  
 21 has been delivered by USPS in accordance with lawful regulations, Plaintiffs lack standing to sue  
 22 USPS.

23 The alleged harms of increased expenses for public welfare and services are at least two  
 24 causative steps removed from the Postal Service's act of delivery. SROs could have, but failed  
 25 to, redress their inability to deliver mail to residents; and the same is true of the City. The City,  
 26

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27 <sup>4</sup> See also 28 U.S.C. § 2680(b) by which Congress chose to immunize the Postal Service  
 28 from liability for "any claim arising out of the loss, miscarriage or negligent transmission of  
 letters or postal matter."

1 having required installation of USPS compliant apartment style delivery receptacles, could also  
 2 have required that those same SROs fulfilled their management responsibility to make proper use  
 3 of them. Thus, the harms alleged by Plaintiffs are not caused by the Postal Service's act of  
 4 delivering the mail to a single point of delivery. Aside from a few anecdotes of missing mail  
 5 arising after the Postal Service effectuated delivery, Plaintiffs' factual showing consists of  
 6 conclusory allegations. Plaintiffs' claims should accordingly be dismissed as a matter of law.

## 7                   2.       Redressability

8           Because the alleged harms are caused by the intervention of third parties or other factors  
 9 independent of USPS mail delivery, they are not redressable by injunctive relief applied to the  
 10 Postal Service. Hence, Plaintiffs lack standing.<sup>5</sup> The Supreme Court has held that it must be  
 11 "likely, as opposed to merely speculative" that the alleged harm will be addressed by judicial  
 12 action against the Defendant. Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 169  
 13 (2000); see also Lujan, *supra* at 595 (requiring a "substantial likelihood" the harm will be  
 14 addressed). The redressability requirement is closely linked to the causality requirement, so  
 15 much so that the Ninth Circuit has at times treated challenges on these grounds as one category.  
 16 See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517 (9th Cir. 1992) ("We can deal  
 17 with the two components together, for they are both 'alike in focusing on the question of  
 18 causation.'") (citations omitted). The corollary to these cases is that the alleged harm is being  
 19 caused by an independent party or other factor external to USPS conduct. Consequently, were  
 20 this Court to enjoin the Postal Service as Plaintiffs request, the alleged harms would not be  
 21 redressed.

22           Here, the alleged problems arise from individuals who interfere with mail after its lawful  
 23 delivery to SROs. Compl. ¶ 2. For example, plaintiffs allege that desk clerks tamper with the

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 27           <sup>5</sup> In this matter, arguments put forth by Defendants regarding the lack of standing overlap  
 28 with this Court's lack of jurisdiction, the legal system's lack of redressability, and with Plaintiffs' lack of a cause of action.

1 mail.<sup>6</sup> *Id.* ¶ 4. Because SRO owners and their management teams also have access to delivery  
 2 receptacles, no injunction against the USPS would redress the claimed injury. Moreover, any  
 3 injunction against the Postal Service would not reduce the City's claimed expenditures because  
 4 the real malefactors' conduct would still occur. It is pure speculation to conclude that a change  
 5 in USPS's policies would affect the City's public expenditures. The City's failure to plead facts  
 6 supporting injury in fact caused by Postal Service action requires that Plaintiffs' claims one  
 7 through four must be dismissed for lack of standing and for failure to state claims that the  
 8 requested relief would cure.

9 **D. Plaintiffs' Claims Should be Dismissed Because Congress has Created an**  
 10 **Alternative, Exclusive Avenue for Relief**

11 Plaintiffs' first through fourth claims are cognizable under the exclusive statutory scheme  
 12 for grievances against USPS that Congress established when it enacted the 2006 Postal  
 13 Accountability and Enhancement Act ("PAEA"). The Act created the Postal Regulatory  
 14 Commission ("Regulatory Commission" or "PRC") to replace the former Postal Rate  
 15 Commission ("Rate Commission"). *See* 39 U.S.C. § 501. This Court should thus dismiss  
 16 Plaintiffs' claims for failure to exhaust remedies available only through the exclusive  
 17 congressionally-established venue for such claims. The PAEA provides that "[A]ny interested  
 18 person . . . who believes the Postal Service is not operating in conformance with the requirements  
 19 of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter (or regulations  
 20 promulgated under any of those provisions) may lodge a complaint with the Postal Regulatory  
 21 Commission in such form and manner as the Commission may prescribe." 39 U.S.C. § 3662  
 22 (emphasis added). 39 U.S.C. § 403(c), in turn, states that, "In providing services and in  
 23 establishing classifications, rates, and fees under this title, the Postal Service shall not, except as  
 24 specifically authorized, in this title, *make any undue or unreasonable discrimination among*

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25 <sup>6</sup> Such conduct can constitute criminal acts. For this reason, the Postal Service has  
 26 repeatedly requested that complaints regarding the (mis-) delivery of mail be referred to the  
 27 United States Postal Inspection Service. A letter reminding SRO managers of their obligations to  
 28 distribute mail has recently been sent to more than 300 SROs identified as receiving single point  
 delivery. Nevertheless, without the assistance of complainants or victims, enforcement can be  
 problematic.

1 *users of the mails*, nor shall it grant any undue or unreasonable preferences.” 39 U.S.C. § 403(c)  
 2 (emphasis added). Congress endowed the Postal Regulatory Commission with the exclusive  
 3 authority to “take such action as the Commission considers appropriate in order to achieve  
 4 compliance with the applicable requirements and to remedy the effects of noncompliance. . . .”  
 5 39 U.S.C. § 3662. Decisions of the Regulatory Commission are only reviewable in the United  
 6 States Court of Appeals for the District of Columbia. 39 U.S.C. § 3663.<sup>7</sup>

7 Plaintiffs’ claims one through four allege that USPS discriminates between users of the  
 8 mail – SRO renters and apartment renters. Plaintiffs complain of harms caused “because of the  
 9 Postal Service’s discriminatory mail delivery policy.” Compl. ¶ 3. Specifically, Plaintiffs allege  
 10 that USPS discriminates against a particular class of economically disadvantaged individuals,  
 11 “some of the city’s most vulnerable residents.” *Id.* Plaintiffs filed their claim on behalf of  
 12 “disabled, elderly, and low-income residents of San Francisco,” *id.* ¶ 5, because Plaintiffs believe  
 13 “they are entitled to the same method of mail delivery . . . that is afforded to all other tenants in  
 14 all other apartment buildings.” *Id.* ¶ 2. Simply put, Plaintiffs allege that “[t]he Postal Service’s  
 15 decision to deny mail delivery to individual SRO residents – while continuing to provide  
 16 individual mailbox delivery to all other apartments in the City – is discriminatory. . . .” *Id.* ¶ 31.  
 17 Plaintiffs’ allegations fall squarely under the prohibition against discrimination among users of  
 18 the mails under 39 U.S.C. § 403(c).

19 Plaintiffs’ exclusive avenue for redress is the Postal Regulatory Commission, subject to  
 20 federal appellate review in the District of Columbia Court of Appeals. There are few federal  
 21 court decisions following Congress’s enactment of the PAEA and creation of the PRC in place of  
 22 the Rate Commission, and none addressing the Regulatory Commission’s authority to adjudicate  
 23 service complaints. The Rate Commission had a comparatively limited regulatory role extending  
 24 largely to the definition, terms of service and prices for respective Postal Service products  
 25 embodied in a schedule of rates and fees, and the Domestic Mail Classification Schedule. *See*  
 26 *e.g.*, Postal Rate Commission Docket No. R2006-1, available at [www.PRC.gov](http://www.PRC.gov). Today, the

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27  
 28 <sup>7</sup> Moreover, such judicial review is narrowly prescribed – available only for a period of  
 thirty days following final PRC action.

1 Postal Regulatory Commission is a full blown regulator as reflected in its new name.<sup>8</sup>  
 2 Notwithstanding the old Postal Rate Commission's limited authority, other Circuits held that the  
 3 former Rate Commission provided the sole venue for claims the Rates Commission was  
 4 statutorily authorized to hear. The Rate Commission's authority did extend to hearing  
 5 complaints as follows:

6 Interested parties who believe the Postal Service is charging rates which do not  
 7 conform to the policies set out in this title or who believe that they are not  
 8 receiving postal service in accordance with the policies of this title may lodge a  
 complaint with the Postal Rate Commission in such form and manner as it may  
 prescribe. . . .

9 Former 39 U.S.C. § 3662

10 In LeMay v. Postal Service, 450 F.3d 797 (8th Cir. 2006), the plaintiff complained that  
 11 the Postal Service was not giving Priority Mail expedited handling. The Eighth Circuit affirmed  
 12 the lower court decision dismissing the case for lack of jurisdiction, finding that § 3662 provided  
 13 the sole remedy for complaining about postal services:  
 14

15 The [Postal Reorganization Act's] legislative history shows that, in crafting the  
 16 Act, Congress intended to minimize external intrusions on the Postal Service's  
 17 managerial independence. Buchanan v. United States Postal Service, 508 F.2d  
 18 259, 262 (5th Cir. 1975). Congress intended to afford postal management the  
 "unfettered authority and freedom that has been denied for years to maintain and  
 operate an efficient service." Sen. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970).

19 Congress gave meaning to this intention by placing within the Postal Service the  
 20 means to redress a disaffected party's concerns about postal rates and services.  
 21 Unhappy postal patrons were given recourse to the [Rate Commission]. This is a  
 22 specific grant of authority over a defined category of postal rate/postal service  
 23 concerns. This specific designation is contrasted with the District Courts'  
 otherwise general jurisdiction. Considering the differing treatment of the varying  
 types of postal disputes, in light of Congress's stated purpose in enacting the  
 PRA, it is "fairly discernable" that Congress intended to remove consideration of  
 most postal service complaints from the courts altogether.

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26  
 27 <sup>8</sup> See PAEA Title II (*Modern Rate Regulation*), Title III (*Modular Service Standards*),  
 28 and Title VII (*Enhanced Regulatory Commission*). *Postal Accountability and Enhancement Act*,  
 Public Law 109-435.

1 Section 3662, as amended by the PAEA, expressly affords the PRC with jurisdiction over  
 2 the fairness standard in title 39 – section 403(c). The PAEA also expressly limits how  
 3 complainants can get judicial review in federal courts. Complainants must first go to the PRC,  
 4 and then within 30 days after a final PRC action, an undue discrimination matter can only be  
 5 appealed to the District of Columbia Court of Appeals. Because Plaintiffs have failed to avail  
 6 themselves of the exclusive avenue to judicial review in the federal courts, this Court should  
 7 dismiss the Complaint in its entirety.

8 By analogy, it is “fairly discernable” that the Regulatory Commission (subject to  
 9 appellate review) is the exclusive remedy for complaints cognizable under § 3662, including all  
 10 of Plaintiffs’ allegations of discrimination. The Sixth Circuit dismissed for lack of jurisdiction a  
 11 case similar to the present case, holding that the plaintiff could not bring First Amendment  
 12 challenges to USPS’s policies in federal court before bringing them before the Postal Rates  
 13 Commission because the challenges implicated mail rates and classifications. See The Enterprise,  
 14 Inc. v. Bolger, 774 F. 2d 159 (6th Cir. 1985) (“review of a mail rate or classification decision . . .  
 15 may be sought only on review in the United States Court of Appeals and not by plenary action in  
 16 the district court.”). Congress specifically identified and categorized discrimination complaints  
 17 in § 403(c) and singled them out for the Regulatory Commission’s jurisdiction. This Court  
 18 should not accept Plaintiffs’ attempted re-branding of their allegations of discrimination  
 19 regarding delivery of mail as constitutional claims that allow them to circumvent the explicit  
 20 statutory avenues of redress Congress created for such grievances. Cf. Weinberger v. Salfi, 422  
 21 U.S. 749, 762 (1975) (holding that the district court lacked jurisdiction to hear plaintiff’s  
 22 constitutional challenge to sections of the Social Security Act because Congress required  
 23 constitutional challenges to be brought along with nonconstitutional challenges under the Act’s  
 24 jurisdictional grant).

25 Even if this Court chooses to recognize the Plaintiffs’ constitutional claims as  
 26 independent causes of action from § 403(c) statutory claims, it should dismiss those claims  
 27 without prejudice so the underlying, statutory administrative process can be applied. 28 U.S.C.  
 28 §1331 grants federal courts jurisdiction to hear Constitutional claims. See FDIC v. Meyer, 510

1 U.S. 471 (1994). Notwithstanding the existence of Constitutional claims should not preclude  
 2 dismissal with prejudice in this case, where the Constitutional claims all depend entirely on an  
 3 express statutory claim for which this Court lacks jurisdiction.

4 Lastly and significantly, the mix of fact and law in the instant docket falls squarely within  
 5 a recent Ninth Circuit decision governed by the pre-PAEA Postal Reorganization Act – with one  
 6 critical distinction. In Currier v. Potter, 379 F.3d 716 (9th Cir. 2003), the Ninth Circuit held that  
 7 the Postal Rate Commission did not have jurisdiction to hear constitutional and other claims  
 8 based on the USPS's mail delivery policies. The court held that the Postal Rate Commission  
 9 lacked jurisdiction because the case did not concern the Postal Service Board of Governor's Rate  
 10 determination (what it was statutorily authorized to review). Id. at 724 n. 5. On this specific  
 11 point, the instant case is readily distinguishable from Currier because the PAEA dramatically  
 12 altered the regulatory landscape in 2006. Congress granted the Regulatory Commission authority  
 13 to hear complaints different from and broader than the former Rate Commission, and that  
 14 authority explicitly includes claims sounding under section 403(c). The private right of action  
 15 found in Currier has now been superseded by the clear intent of Congress to give the Regulatory  
 16 Commission, and ultimately the District of Columbia Circuit Court, jurisdiction over 403(c)  
 17 complaints.

18 **E. No Justiciable Controversy Exists Between the City and USPS**

19 This Court cannot provide declaratory judgment as to whether S.F. Administrative Code  
 20 § 41E is preempted by the Supremacy Clause of the U.S. Constitution because Plaintiffs allege  
 21 no case or controversy implicating the legal rights of USPS. Therefore Plaintiffs provide no  
 22 basis for this Court's jurisdiction. Congress provided federal courts discretionary authority to  
 23 grant declaratory relief in "a case of actual controversy within its jurisdiction." 28 U.S.C. §  
 24 2201. A case or controversy for purposes of § 2201 must implicate the legal rights of at least two  
 25 parties with adverse legal interests. The Supreme Court held that the determination of whether a  
 26 case is judiciable for declaratory judgment turns on "whether the facts alleged, under all the  
 27 circumstances, show that there is a substantial controversy, *between parties having adverse legal*  
 28 *interests*, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

1 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007), quoting Maryland Casualty Co.  
 2 v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) (emphasis added). Further, to satisfy the  
 3 case and controversy requirement, the alleged controversy must be “touching the *legal relations*  
 4 of parties having adverse legal interests.” *Id.* quoting Aetna Life Ins. Co. v. Haworth, 300 U.S.  
 5 227, 241 (1937) (emphasis added). In summary, declaratory relief “is available only for a  
 6 ‘concrete case admitting of an immediate and definite determination of the legal rights of the  
 7 parties.’” Public Service Commission of Utah v. Wycoff Co., Inc., 344 U.S. 237, 243 (1952),  
 8 quoting Aetna at 466.

9 Plaintiffs’ request for declaratory judgment does not satisfy the “actual controversy”  
 10 requirement because the alleged controversy does not implicate the legal rights or duties of  
 11 USPS. In enacting S.F. Administrative Code § 41E, the City imposed duties on San Francisco  
 12 SRO owners – namely, to install individualized mail receptacles and make arrangements with  
 13 USPS for delivery to them. Compl. ¶ 29. However, the City explicitly does not attempt to  
 14 regulate the activities of USPS. One need only consider whether the legal rights or duties of  
 15 USPS would be altered by a declaration by this Court as to whether the City’s statute is  
 16 preempted by federal regulation. They would not. Instead, the City is asking this Court to  
 17 provide a declaration as to the constitutional validity of its own statute in total absence of a  
 18 legally proper defendant. This Court does not have jurisdiction to do so. It would by contrast be  
 19 proper for SRO owners to challenge the validity of the City’s ordinance because it imposes legal  
 20 duties upon them; but it is inappropriate for the City to ask the Court for a declaration, in absence  
 21 of another party whose legal rights and duties are implicated, at this time. While USPS has  
 22 offered its opinion on the legal status of the City’s ordinance, a mere alleged difference of  
 23 opinion does not entitle Plaintiffs to the binding force of a judicial declaration. This Court  
 24 cannot issue any declarative relief because, for these reasons, Plaintiffs’ allegations do not satisfy  
 25 the controversy clause of 28 U.S.C. § 2201 and thus the Court lacks jurisdiction to hear the  
 26 City’s fifth claim.

#### 27 **F. The Court Should Dismiss the Individual Defendants**

28 Defendants John Potter, Michael Daley and Noemi Luna should be dismissed from this

1 suit, as there is no valid reason to sue them in their official capacities when their employer, the  
 2 Postal Service – which is the focus of Plaintiffs’ grievances – is also a named defendant in the  
 3 suit. Courts have consistently found that a suit brought against an individual government officer  
 4 in his or her official capacity “is not a suit against the official but rather a suit against the  
 5 official’s office.” Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). Indeed, the  
 6 Supreme Court held in Brandon v. Holt, 469 U.S. 464, 470-472 (1985), that a plaintiff bringing a  
 7 constitutional claim could either proceed directly against a government entity that had waived  
 8 sovereign immunity, or indirectly sue the entity through an “official capacity” suit against an  
 9 individual officer – indicating that the two actions were equivalent. However, the Court  
 10 subsequently stated that its decision in Monell v. New York City Dept. of Social Servs., which  
 11 waived sovereign immunity with respect to local government units, had rendered official-  
 12 capacity actions against local government officers unnecessary. See Kentucky v. Graham, 473  
 13 U.S. 159, 167 n.14 (1985), citing Monell, 436 U.S. 658 (1978). The Court further found that  
 14 unless a plaintiff intended to state a cause of action against the government officer in a personal  
 15 capacity, the government entity, and not the officer, should be named as the defendant.  
 16 Kentucky, 473 U.S. at 165-66. Thus, suing individual government officers in their official  
 17 capacities is reasonable only when it is a necessary means to avoid a potential sovereign  
 18 immunity problem where direct claims against the government entity in question are barred. See  
 19 Bakal v. Ambassador Contr., No. 94-CV-584, 1995 U.S. Dist. LEXIS 10542, \*10-11 (S.D.N.Y.  
 20 Jul. 26, 1995) (explaining that suits against officials are permitted as necessary to avoid obstacles  
 21 relating to Eleventh Amendment or sovereign immunity). But where a plaintiff sues an  
 22 individual government officer in his or her official capacity, and also sues the government entity  
 23 of which that officer is an agent, courts have determined that the official-capacity claims are  
 24 redundant and unnecessary.

25 Thus, the Ninth Circuit has consistently dismissed official-capacity agents as defendants  
 26 in constitutional rights cases where the government agency is being or can potentially be sued.  
 27 See Ctr. For Bio-Ethical Reform, Inc. v. Los Angeles Cty. Sheriff Dep’t, 533 F.3d 780, 799 (9th  
 28 Cir. 2008) (dismissing sheriff as a “redundant defendant” because the sheriff’s department,

1 which does not have sovereign immunity, was a named defendant); Rendon v. City of Fresno,  
 2 2007 U.S. Dist. LEXIS 60710, \*17-18 (E.D. Cal. Aug. 3, 2007); Luke v. Abbott, 952 F. Supp.  
 3 202, 203-204 (C.D. Cal. 1997); Vance v. County of Santa Clara, 928 F. Supp. 993, 996 (N.D.  
 4 Cal. 1996) (holding that the official capacity claims against individual officials were duplicative  
 5 and should be dismissed since the government entity they represented was also being sued).  
 6 Furthermore, while the defendants in many of these cases were local or municipal entities and  
 7 individuals, the policy of discouraging official-capacity claims has likewise been applied to  
 8 federal government entities and officials. See, e.g., Cutter v. Metro Fugitive Squad, 2008 U.S.  
 9 Dist. LEXIS 66572, \*14-15 (W.D. Okla. Aug. 28, 2008) (dismissing official capacity claims  
 10 against individual federal and state officials because plaintiffs had also sued respective state and  
 11 federal government entities).

12 Because USPS has not asserted sovereign immunity as a defense in this action, Plaintiffs  
 13 have no rational basis upon which to sue individual USPS officials John Potter, Michael Daley  
 14 and Noemi Luna in their official capacities. To retain these individuals as defendants will “only  
 15 lea[d] to a duplication of documents and pleadings, as well as wasted public resources for  
 16 increased attorneys [sic] fees.” Luke v. Abbott, 954 F. Supp. at 204. As such, it is appropriate  
 17 “for the Court upon request to dismiss the[se] officer[s]” and retain only USPS as the proper  
 18 defendant in this suit. Id.

#### 19 IV. CONCLUSION

20 Defendants respectfully request the Court to grant its motion and dismiss all claims with  
 21 prejudice.

22  
 23 DATED: July 27, 2009

Respectfully submitted,

24 JOSEPH P. RUSSONIELLO  
 25 United States Attorney

26  
 27 By: /s/  
 28 ANDREW Y.S. CHENG  
 Assistant United States Attorney

\*E-Filed 6/24/11\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CITY OF SAN FRANCISCO, et al.,

No. C 09-1964 RS

Plaintiffs,

v.

**ORDER DENYING PLAINTIFF'S  
MOTION TO STAY, MODIFYING  
SCHEDULE**

UNITED STATES POSTAL SERVICE,

Defendant.

The parties have filed competing motions. Plaintiffs request a stay of all litigation (save defendant's deadline to exchange its rebuttal expert reports) pending resolution of a regulatory complaint recently filed before the Postal Regulatory Commission ("PRC"). Defendants oppose a stay, and argue that fairness and efficiency require that the case continue to summary judgment and, if need be, trial. They do, however, request a modification of the dispositive motion hearing date so that the *filing* date will fall after defendants receive certain discovery materials. Although plaintiffs request to stay the entire matter, they nonetheless oppose moving out the dispositive motion deadline.

A court may in its discretion stay proceedings in appropriate circumstances. Generally, a court looks to three factors: (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party; (2) whether a stay will simplify the issues in question and trial

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ORDER

1 of the case; and (3) whether discovery is complete and whether a trial date has been set. *See, e.g., In*  
 2 *re Cygnus Telecom. Tech., LLC Patent Litig.*, 385 F. Supp. 2d 1022, 1023 (N.D. Cal. 2005) (citing  
 3 *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 406 (W.D. N.Y. 1999); *ASCII Corp. v. STD Entm't*  
 4 *USA, Inc.*, 844 F. Supp. 1378, 1380 (N.D. Cal. 1994)).

5 A stay is not warranted here. The Postal Service argues, as an initial matter, that it will be  
 6 unduly prejudiced by waiting for a resolution of the PRC complaint. The Postal Service complains  
 7 that after two years of expensive discovery (and vigorous discovery battles), it is ready to challenge  
 8 plaintiff's constitutional claims, to test plaintiff's evidentiary presentation, and to resolve the case at  
 9 either summary judgment or trial. Defendants argue, in other words, that they also have a right to  
 10 their respective "day in court" to defend against plaintiff's (apparently widely publicized)  
 11 allegations.

12 Moreover, even plaintiffs agree that their regulatory claims filed before the PRC are separate  
 13 and distinct from those constitutional claims that make up this litigation. Indeed, in the summer of  
 14 2009, defendants moved to dismiss the instant complaint and argued that, even if plaintiffs had  
 15 stated viable constitutional claims, it would make sense to defer resolution until plaintiffs first  
 16 sought relief through the PRC's administrative channels. Plaintiffs successfully defended against  
 17 that motion by disavowing that theirs were regulatory claims, or claims that depended on resolution  
 18 of hypothetical regulatory claims. As a matter of fairness, it is difficult to ignore plaintiffs'  
 19 complete reversal of position. Two years ago, they insisted that deferral or delay of this litigation  
 20 pending a regulatory proceeding in the PRC would add little but in turn prejudice the individuals  
 21 plaintiffs represent by delaying relief. They now essentially argue the opposite: that a regulatory  
 22 proceeding will at least "help" matters in this litigation enough to warrant interruption roughly three  
 23 months prior to their scheduled trial date. More importantly, the plaintiffs do not actually argue that  
 24 resolution of the regulatory complaint will "simplify" the substantive issues in question. Plaintiffs  
 25 contend the matter would be simplified not because the constitutional claims depend or are informed  
 26 by the regulatory ones, but because plaintiffs promise they will be so "satisfied" with a favorable  
 27 PRC decision that they will voluntarily drop their constitutional claims. Given the major reversal  
 28

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1 behind plaintiffs' stay request, plaintiffs should not be surprised if the Court receives this new  
2 promise with some skepticism.

3 Finally, discovery is nearly complete and a trial date was long ago set. In other words, the  
4 competing considerations with which this Court is tasked do not warrant the stay requested. That  
5 said, a compromise of sorts regarding scheduling is perhaps in order. This Court granted, over  
6 defendants' opposition, plaintiffs a slight extension of discovery deadlines. As the Postal Service  
7 points out, the new deadlines operate such that defendant's deadline to file a motion for summary  
8 judgment falls at a point in time prior to the date on which they will receive certain documents and  
9 discovery. Accordingly, the slight extension of the dispositive motion hearing deadline defendants  
10 request is warranted. As the parties are still in the midst of varied discovery battles, and have filed  
11 myriad discovery motions, it makes sense to push the dispositive motion deadline out slightly  
12 further than requested to allow the referral judge an opportunity to address the parties' numerous  
13 filings. All dispositive motions shall be heard no later than October 13, 2011. The trial date shall  
14 be continued to January 9, 2012. The continuance of the trial date is convenient for the Court's  
15 schedule and the slight delay does indeed allow plaintiffs to pursue their regulatory complaint.  
16 Should plaintiffs prevail there, they of course remain free to voluntarily to dismiss this matter.

17  
18  
19 IT IS SO ORDERED.

20  
21 Dated: 6/24/11

22   
23 RICHARD SEEBORG  
24 UNITED STATES DISTRICT JUDGE  
25  
26  
27  
28

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